

No. 11583

v. 2467

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

BENJAMIN N. WILHITE,
Appellee.

Apostles on Appeal

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

JUN 14 1947

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
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WOOD, MATTHIESSEN & WOOD,
ERSKINE WOOD,

LOFTON L. TATUM,
1310 Yeon Building,
Portland 4, Oregon,
For Appellant.

TANNER & CLARK,
EDWARD J. CLARK,
1041 Pacific Bldg.,
Portland 4, Oregon,
For Appellee.

In the District Court of the United States
for the District of Oregon

No. Civ. 3144

BENJAMIN N. WILHITE,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

LIBEL IN ADMIRALTY

(In Personam)

Libelant, for cause of action Civil and Maritime,
in personam, in Admiralty, alleges:

Article I.

Libelant is a resident of the City of Portland, Multnomah County, Oregon; this suit is brought pursuant to the Suits in Admiralty Act (46 U.S.C.A. Section 742) and pursuant to Public Law 17, enacted by the 78th Congress, approved March 24, 1943, and General Order 32 made pursuant thereto.

Article II.

W. R. Chamberlin Company is now, and at all times herein mentioned has been, a corporation, duly organized and existing under and by virtue of the laws of the State of; the SS Franklin K. Lane is a merchant vessel, operated at all times herein alleged by said corporation, under a General

Agency Agreement with the respondent, United States of America, which was at all times the owner in control of said vessel, and libelant was at all said times an employee thereon of the respondent, employed through the War Shipping Administration of the United States.

Article III.

That on or about January 3, 1946, libelant signed on as carpenter with tools at Portland, Oregon, on the SS Franklin K. Lane, and on January 20, 1946, while said vessel was in and about to depart from the Port of Portland, Oregon, the libelant, pursuant to the ship's rules and [1*] within the duties of his employment, was required to do carpenter work upon said vessel wherever directed, and to care for the anchor, and was directed and ordered at said time and place to proceed with haste to the anchor; that in proceeding to said place in response to said order and direction, he was required to pass under two 6 x 6 timbers suspended under the gun deck on the after part of the ship by means of life rings; that one end of one of said timbers had been lowered, or had become lowered, with the result that the same did not afford passage for the claimant thereunder; that his head came in violent collision with said end of said timber, knocking him to the deck, and causing him the grievous injuries hereinafter more particularly referred to.

Article IV.

That the respondent, through the officers and crew

* Page numbering appearing at foot of page of original certified Transcript of Record.

in charge of said SS Franklin K. Lane, was careless and negligent in each of the following particulars:

(a) In not furnishing libelant a safe place in which to work, and in not having said ship seaworthy by having said end of said timber properly secured and lashed at a height which would permit the libelant to pass safely thereunder without collision therewith.

(b) In not warning the libelant of said unsafe and unseaworthy position of said timber.

Article V.

That as the proximate result of the careless and negligent acts as aforesaid, and because thereof, libelant's head came violently into collision with said lowered end of timber, knocking him to the deck and thereby causing severe injuries to his skull and brain, the exact extent of which injuries are to libelant unknown; that he thereby suffered a severe and unusual nervous and physical shock, and has suffered and still suffers a severe injury to his eyes and vision, and has suffered and still suffers continual noises in his head and strange [2] and unnatural feelings of pressure and distress with respect to his head, and has suffered and continues to suffer headaches, dizziness and fainting spells; that he was thereby caused great pain and suffering and will continue for a long time in the future to endure pain and suffering, and his earning power has been permanently impaired, and he has been

informed and verily believes, and therefore alleges, that he has been permanently injured, all to his damage in the sum of \$30,000.00.

Article VI.

That libelant was at the time of receiving said injuries enjoying good health, and was a strong, ablebodied man, regularly employed, and earning approximately \$350.00 per month; that as a result of said negligence of respondent, and because thereof, libelant has lost earnings in the sum of \$3500.00; that he is further entitled to maintenance and cure beginning with the date of his injury in the sum of \$1125.00 that he was taken from the ship at Vancouver, B. C., and has not received his transportation to Portland, Oregon, all to his further special damage in the sum of \$20.00 for such transportation.

Article VII.

That heretofore and on February 26, 1946, libelant duly furnished a statement of his claim as required by said General Order No. 32, hereinabove referred to, to said W. R. Chamberlin Company, General Agent above named, and that more than sixty days have elapsed since the filing of said claim, without a notification in writing to libelant of a determination upon said claim, thereby permitting libelant to institute this libel.

Wherefore libelant prays judgment against respondent for the sum of Thirty Thousand (\$30,000.00) Dollars general damages, for the sum of

\$3500.00 special damages for lost earnings, for the sum of \$1125.00 maintenance and cure, for the sum of \$20.00 special damages for transportation from Vancouver, B. C. to Portland, Oregon, together with his costs and disbursements herein incurred.

TANNER & CLARK,
Proctors for Libelant.

State of Oregon,
County of Multnomah—ss.

Benjamin N. Wilhite, being first duly sworn, on oath deposes and says: That he is the libelant named herein; that he has read the foregoing libel and knows the contents thereof, and that the allegations thereof are true of his own knowledge except the allegations made on information and belief, and that as to those allegations he believes them to be true.

/s/ BENJAMIN N. WILHITE.

Subscribed and sworn to before me this 13th day of May, 1946.

[Seal] /s/ EDWARD J. CLARK,
Notary Public for Oregon.

My commission expires Sept. 14, 1946.

[Endorsed]: Filed May 13, 1946. [4]

[Title of District Court and Cause.]

ANSWER

Respondent, answering the libel in this cause, says:

Article I.

Admits the allegations of Article I.

Article II.

Admits all the allegations of Article II, except that this ship was operated by the corporation, W. R. Chamberlin & Co., and alleges the truth to be that said company performed certain services in respect to the ship under said Agency Agreement, but the operation was in the control of the owner of said vessel, the United States of America.

Article III.

Answering Article III of the libel, respondent denies knowledge or information sufficient to form a belief of the allegations thereof, except the following, which respondent admits, to-wit: That libelant signed on as carpenter at Portland, Oregon, not on January 3rd, as alleged, however, but on January 5, 1946.

Article IV.

Respondent denies the allegations of Article IV, and each of them.

Article V.

Respondent denies the allegations of Article V.

Article VI.

Respondent denies the allegations of Article VI, and admits was not paid transportation to Portland, Oregon. [5]

Article VII.

Respondent admits the allegations of Article VII. Wherefore respondent prays that libelant take nothing, and that respondent have and recover its costs and disbursements herein.

/s/ HENRY L. HESS,

U. S. Atty.

/s/ WOOD, MATTHIESSEN

& WOOD,

Proctors for Respondent.

State of Oregon,
County of Multnomah—ss.

I, Erskine Wood, being first duly sworn, say that I am the proctor who prepared this answer, from information furnished me by the respondent, and that the same is true, as I verily believe.

/s/ ERSKINE WOOD

/s/ LOFTON L. TATUM

Notary Public for Oregon.

My commission expires: May 7, 1947.

Subscribed and sworn to before me this 24 day of July, 1946.

[Seal]

Service of the within answer, by certified copy, at Portland, Oregon, this 26th day of June, 1946, is hereby admitted.

/s/ EDWARD J. CLARK

Of Proctors for Libelant.

[Endorsed]: Filed July 26, 1946. [6]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This cause came on regularly for trial before the undersigned Judge, sitting by designation, on Thursday the 16th day of January, 1947. Libelant was present in person and represented by his counsel K. C. Tanner, Esq., and Edward J. Clark, Esq., and the United States of America was represented by its counsel Erskine Wood, Esq., Erskine B. Wood, Esq., and Victor Harr, Esq.; thereupon oral and documentary evidence was introduced by and on behalf of the parties hereto and at the conclusion of all of the evidence the parties rested and thereupon the cause was argued to the Court by the respective parties and the same was by the Court taken under advisement and the Court having considered all of the evidence introduced and the arguments of counsel, and being fully advised in the premises, now makes and orders filed its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

I.

That the libelant is and for some years last past has been a resident of the City of Portland, County of Multnomah, State and District of Oregon.

II.

That on or about the 3rd day of January, 1946, the respondent, the United States of America, was the owner and in control of the SS Franklin K. Lane, a merchant vessel. [7]

III.

That on or about the 3rd day of January, 1946, the libelant signed articles on the said SS Franklin K. Lane as a carpenter with tools at Portland, in the State and District of Oregon, at an agreed compensation or base rate of pay of \$157.50, plus \$10.00 for the rent of his said tools.

IV.

That there was on the 20th day of January, 1946, on the said ship a certain appliance constructed of two timbers approximately 6" x 6", the exact length not being established by the evidence, known as fog buoys and used at times while the ship was in motion at sea; when not in use the said timbers were secured by being lashed to the underside of the gun deck on said ship and the place of the lashing of the said timbers was so constructed that the timbers could be securely lashed and secured under

said gun deck in such a manner as to afford a clearance of approximately 7 feet to any person employed on the said ship as a member of the crew, desiring to use the passageway under said gun deck in going from one part of the ship to another in the performance of his duties; the said timbers were customarily so lashed on said vessel as to afford such clearance, and ordinary care required the owner and operator of the said vessel to so lash said timbers as to afford such clearance in the performance of the duties of such owner and operator of such vessel to afford to its employees and the members of its crew a safe place within which to work.

V.

That on the 20th day of January, 1946, the libelant was on board the SS Franklin K. Lane in the performance of his duties as a crew member and carpenter thereon, and was directed by the Chief Mate of the said vessel to proceed immediately from where he was to the anchor to perform some duty there. [8]

VI.

That at sometime prior to the giving of the order to the libelant one end of the fog buoy and timbers that had been theretofore lashed to the underside of the gun deck had been lowered by certain members of the crew in order that life buoys might be hung on the said timbers to be painted, and after lowering the end of the said timbers there was a

clearance of less than 6 feet to anyone attempting to use the passageway, over which the timbers were suspended, in going from one portion of the ship to the other; there was no sign given of the lowering of the said timbers, the passageway was in no manner closed off so as to prevent its use while the timbers were so lowered; there was no warning of any kind given to the libelant of the lowering of the said timbers or that there was no longer a clearance space of 7 feet under which a workman could pass and the libelant had no knowledge that the said timbers had been so lowered and the libelant, without knowledge that said timbers had been so lowered as aforesaid and believing they had been so lashed and secured as to afford ample head room to pass thereunder, immediately obeyed the order of the said Chief Mate and proceeded toward the anchor and in so doing his head came violently into collision with the lowered end of the said timber, staggering him for a few moments; he became dazed and dizzy and commenced to suffer with a headache; during the time herein mentioned the SS Franklin K. Lane was at the dock in Portland, Oregon, and during the afternoon of January 20, 1946, sailed and proceeded to Vancouver, British Columbia, where the libelant, still suffering from dizziness and headaches, received the attention of a physician and surgeon and on the advice of the said physician and surgeon left the said ship for medical treatment and was paid off on the 29th of January, 1946; libelant thereafter proceeded home

to Portland, Oregon, where he received medical care and attention for his injuries. [9]

VII.

That since the inflicting of the injuries upon him the libelant has suffered with headaches, ringing in his head and ears and with pain, and because thereof was unable to work or earn a living for himself for a period of four months after the 29th day of January, 1946, at which time his condition improved to a point where he was able to perform work at his trade as a carpenter.

VIII.

That there is no evidence that the libelant suffered any fracture of the skull or a concussion, or any injury to the brain matter itself.

IX.

That the said ship completed its voyage at New Orleans, Louisiana, and the crew members were there paid off and but for the injuries sustained by the libelant he would have continued on said ship until the termination of its voyage for a period of four months and would have earned \$167.50 per month for such four months.

X.

That there is no evidence from which the Court can determine what other sums, in addition to the said agreed wage of \$167.50 per month, in the na-

ture of overtime and bonuses were earned by the carpenter on the said ship during the said voyage, or no evidence from which the Court can fix the amount thereof if the same were earned.

XI.

That the libelant was entitled to payment for his maintenance and cure for a period of four months after the 29th day of January, 1946, at the rate of \$3.50 per day, no part or portion of which has been paid him.

XII.

That in causing the said timbers to be lowered as hereinabove set out, without giving to the libelant any warning thereof whatsoever, and without his knowledge, the respondent [10] was guilty of negligence and breached its duty to the libelant in not furnishing him a safe place within which to perform his work and duties; that the injuries inflicted upon the libelant coming into contact with said timbers and the damage caused thereby to the libelant in his loss of time, in his pain and suffering and inability to work, were and are a direct and proximate result of the said negligence of the respondent aforesaid and a direct and proximate cause of the damage sustained by the libelant.

XIII.

That the libelant has suffered and sustained damage generally, and in addition to the damages herein set out, in the sum of \$2500.00.

From the foregoing Findings of Fact the Court draws the following

CONCLUSIONS OF LAW

I.

That the Court has jurisdiction hereof.

II.

That because of the negligence of the respondent in failing to furnish the libelant a safe place to work and because of its breach of duty in that regard, the respondent has damaged the libelant in the following sums and amounts and the libelant is entitled to a judgment against the respondent in the sum of Four hundred twenty and no/100 (\$420.00) Dollars for maintenance and cure, in the further sum of Six hundred seventy and no/100 (\$670.00) Dollars for loss of wages and in the further sum of Twenty-five hundred and no/100 (\$2500.00) Dollars as general damages, making a total sum of Three thousand five hundred and ninety and no/100 (\$3590.00) Dollars, with interest thereon until paid at the rate provided by law, together with the libelant's costs of action necessarily incurred.

Let judgment be entered accordingly.

Done and dated this 22nd day of January, 1947.

/s/ R. LEWIS BROWN,

United States District Judge.

[Endorsed]: Filed Jan. 22, 1947. [11]

In the District Court of the United States
for the District of Oregon

Civ. No. 3144

BENJAMIN N. WILHITE,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

DECREE

This cause heretofore came on regularly for trial before the undersigned judge, sitting by designation, on January 16, 1947, libelant appearing in person and by K. C. Tanner, Esquire, and Edward J. Clark, Esquire, his proctors, and respondent appearing by Erskine Wood, Esquire, Erskine B. Wood, Esquire, and Victor Harr, Esquire, Assistant United States Attorney, its proctors, and the cause having been tried and submitted, and the court having heretofore made and filed herein its findings of fact and conclusions of law separately, and directed the entry of appropriate decree, and it duly appearing that pursuant to said findings and conclusions decree should at this time be entered in favor of libelant and against respondent in the amounts hereinafter recited, and the court being fully advised in the premises,

It Is Ordered, Adjudged and Decreed that Benjamin N. Wilhite, libelant, have and recover of and

from the United States of America, respondent, the sum of Twenty Five Hundred (\$2500.00) Dollars general damages, the further sum of Six Hundred Seventy (\$670.00) Dollars special damages for loss of wages, the sum of Four Hundred Twenty (\$420.00) Dollars for maintenance and cure, together with the further sum of \$49.76 his costs and disbursements to be taxed as provided by law, and libelant have and he hereby is given interest on said decreē at the rate of 4% per annum until paid.

Dated in open court January 23rd, 1947.

/s/ R. LEWIS BROWN,
Judge.

Have not seen Court's findings, but acknowledge receipt of copy of above.

/s/ ERSKINE WOOD 1/22/47

[Endorsed]: Filed 1/23/47. [12]

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable above entitled Court:

Your petitioner, the respondent, United States of America, prays that it may be allowed to appeal from the final decree entered in this court and cause on the 23rd of January, 1947, to the United States Circuit Court of Appeals for the Ninth Circuit, and that no supersedeas bond be required, in view of

the identity of your petitioner, and that the usual Apostles on Appeal be sent to said United States Circuit Court of Appeals, and that the usual Citation issue in order that said decree may be fully reviewed and modified or reversed as to the said Circuit Court of Appeals may seem just and in accordance with the Assignment of Error filed herewith.

And your petitioner will ever pray.

Dated March 12, 1947.

s/ HENRY L. HESS

/s/ WOOD, MATTHIESSEN
& WOOD

/s/ ERSKINE WOOD

Proctors for Respondent.

It Is Ordered that the appeal herein be allowed as prayed for, and that no supersedeas bond be required.

Dated March 14th, 1947.

/s/ CLAUDE McCOLLOCH,
District Judge.

Service accepted March 14, 1947.

/s/ EDWARD J. CLARK,
Of Proctors for Libelant.

[Endorsed]: Filed March 14, 1947. [13]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Respondent appealing from the final decree entered in this court and cause on January 23, 1947, makes the following Assignments of Error:—

1. The trial court erred in holding the respondent liable at all in damages.

2. If the respondent was liable at all, nevertheless the trial court erred in allowing libelant \$2500.00 general damages, the same being excessive.

3. If the respondent was negligent, the trial court erred in not finding that the libelant was guilty of contributory negligence.

4. The trial court erred in allowing libelant \$670.00 wages and \$420.00 for maintenance and cure, the same being excessive.

/s/ HENRY L. HESS

WOOD, MATTHIESSEN
& WOOD

/s/ ERSKINE WOOD

Proctors for Respondent.

Service accepted March 14, 1947.

/s/ EDWARD J. CLARK

Of Proctors for Libelant.

[Endorsed]: Filed March 14, 1947. [14]

District Court of the United States of America
 District of Oregon

CITATION ON APPEAL

To Benjamin N. Wilhite, Libelant,
 and Messrs. Tanner and Clark, his Proctors,
 Greeting:

Whereas, United States of America, respondent in Cause No. Civ. 3144, entitled Benjamin N. Wilhite, Libelant vs. United States of America, Respondent, in said Court, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree rendered in said Cause in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law;

You Are Therefore Hereby Cited And Admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within forty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 14th day of March, in the year of our Lord, one thousand nine hundred and forty-seven.

/s/ CLAUDE McCOLLOCH,
 Judge.

Due service accepted on March 14, 1947.

/s/ EDWARD J. CLARK

Of Proctors for Libelant.

[Endorsed]: Filed March 14, 1947. [15]

[Title of District Court and Cause.]

DESIGNATION OF APOSTLES

To the Clerk:

Sir:

Will you please prepare the Apostles in this case, and include therein the following:

1. Libel (as amended by interlineation)
2. Answer (as amended by deletion)
3. Transcript of the Evidence
4. Findings of Fact and Conclusion
5. Decree
6. Petition for Appeal, and Order allowing same.
7. Assignments of Error
8. Citation on Appeal.

Respectfully yours,

/s/ ERSKINE WOOD

Of Proctors for Respondent.

Service of the within, by certified copy, at Portland, Oregon, this 15th day of March, 1947, is hereby admitted.

/s/ EDWARD J. CLARK

Of Proctors for Libelant.

[Endorsed]: Filed March 15, 1947. [16]

[Title of District Court and Cause.]

DOCKET ENTRIES

1946

May 13—Filed libel in Admiralty.

May 13—Issued monition—to marshal.

May 18—Filed monition.

July 16—Filed deposition of Benjamin N. Wilhite.

July 26—Filed answer.

1947

Jan. 7—Entered order setting for trial on Jan. 16, 1947 notices McC.

Jan. 15—Issued subpoena and 2 copies to Mr. Clark

Jan. 16—Record of final hearing and order allowing libelant and respondent to amend pleadings by interlineation — submitted. J. Brown.

Jan. 20—Filed subpoena with marshal's return.

Jan. 22—Filed and entered findings of fact and conclusions of law. J. Brown.

Jan. 23—Filed and entered Decree for Libelant. J. Brown.

Jan. 23—Filed and entered cost bill of libelant and notice of date of taxation.

Mar. 14—Filed petition for appeal, by U. S.

Mar. 14—Filed assignments of error.

Mar. 14—Filed citation on appeal.

Mar. 15—Filed designation of apostles.

Apr. 8—Filed transcript of proceedings in duplicate of January 16, 1947. [17]

CERTIFICATE TO TRANSCRIPT

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 18 inclusive constitute the transcript of record upon the appeal from a judgment of said Court in a cause therein numbered Civil 3144, in which United States of America is defendant and appellant and Benjamin N. Wilhite is plaintiff and appellee; that said transcript has been prepared by me in accordance with the designation of apostles of the record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said Court in said cause, in accordance with the said designation, as the same appears of record and on file at my office and in my custody.

I further certify that I have enclosed a duplicate transcript of proceedings dated January 16, 1947.

I further certify that the cost of comparing and certifying the within transcript is \$20.40 and that the same has been paid by appellant.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 10th day of April, 1947.

[Seal] LOWELL MUNDORFF, Clerk.

/s/ By F. L. BUCK,

Chief Deputy. [18]

[Title of District Court and Cause.]

Portland, Oregon, Thursday, Jan. 16, 1947,
10:00 a.m.

Before: Honorable R. Lewis Brown,
Judge.

Appearances:

Messrs. K. C. Tanner and Edward J. Clark, Proctors for Libelant;

Messrs. Erskine Wood, Erskine B. Wood and Victor E. Harr, of Proctors for Respondent.

PROCEEDINGS:

The Court: Number 3144, Benjamin N. Wilhite vs. the United States: Are the parties ready?

Mr. Tanner: The Libelant is ready, yes, sir.

The Court: All right, proceed.

Mr. Erskine Wood: I would like to ask leave to make a minor amendment in the Respondent's answer, Article VI. The Libelant alleges that the Libelant was taken from the ship at Vancouver, B.C., and in Article VI that is admitted, but it is phrased somewhat ambiguously.

The Court: It is denied, isn't it, in Article VI, "except that libelant"?

Mr. Erskine Wood: "except that libelant".

The Court: That is right.

Mr. Erskine Wood: I think the Libelant will probably admit that he left the ship by mutual consent, and therefore I do not want this admission to stand as it is. I would like to amend it to

say that it is denied that he was taken from the ship, except that it is alleged that he left by mutual consent.

Mr. Tanner: I thought I furnished you, Mr. Wood, with the clinical abstract from the doctors. We will have that. I usually furnish these things.

Mr. Erskine Wood: Well, of course, that doesn't make any difference. That is the Libelant's statement about what happened. I think there can be no harm in allowing some minor amendment. I ask that it be done, your Honor.

The Court: Very well, the amendment may be made. Is [2*] it written out? Or the amendment will be made by interlineation by the Clerk. You will step up to the Clerk's desk and give him the language you want.

Mr. Erskine Wood: Shall I do it right now?

The Court: Better do it right now.

(Mr. Erskine Wood approached the Clerk's desk and conversed with the Clerk in an undertone.)

Mr. Erskine Wood: I think that will cover it. I merely scratched out the exception and added the words that we admit that he was not furnished transportation.

Mr. Tanner: Now, we have out pre-trial order prepared and it has been served on——

Mr. Erskine Wood: It was only served on me yesterday afternoon and it is not entirely acceptable to me. If your Honor please, the pre-trial order, I think, is discretionary with your Honor,

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

whether you make it or not, in an admiralty case, and it practically follows the allegations of their libel and our answer, with some minor differences. I see no reason for a pre-trial order, but if there is going to be one I would have to ask that that be modified in some of its phraseology. I don't see that we need one.

The Court: Let me see the proposed pre-trial order.

Mr. Erskine Wood: Do you want a pre-trial order?

Mr. Tanner: We won't insist on it, of course. We [3] would want our clinical abstract to be marked as a pre-trial exhibit, so that there is no question about its admissibility.

The Court: Let me see the pre-trial order.

Mr. Tanner: The primary reason for our pre-trial is to fill in the omissions, to make up the omissions that are contained in the reply. We didn't know what our special damages were when it was filed and we didn't have the amount of our expense, and that is primarily all that is in the pre-trial order.

The Court: Well, the case is set for final hearing. If a pre-trial conference had been desired I think that a motion for that prior to the time of the setting of the case for final hearing would have been sustained, so we will proceed with the trial of the case.

Mr. Tanner: Well, then can I amend the reply by filling up the blank spaces in accordance with the figures that are contained in our pre-trial order?

Mr. Erskine Wood: No objection to his filling up the spaces, your Honor.

The Court: Very well.

Mr. Erskine Wood: But before we proceed I want to make a short statement that really is to serve notice on counsel——

The Court: Counsel, I think we had better get these [4] pleadings in shape. We will do one thing at a time.

Mr. Erskine Wood: Very well.

The Court: You have consented to his filling in those spaces.

Mr. Tanner: One other change: We would like to change the 21st to the 20th. We have made an error there of one day, on the first page, Article III of the libel. That should be the 20th instead of the 21st. May we have that change, your Honor?

The Court: Very well. Proceed.

Mr. Erskine Wood: May I make a statement now, your Honor?

The Court: Proceed.

Mr. Erskine Wood: We have no objection to them inserting those amounts in there.

This accident is claimed to have happened to this man here in Portland and he left the vessel at Vancouver, B.C., and there, as I understand, went to a doctor. Now, the Libelant, so far as I know, has made no attempt to take that doctor's testimony, and that doctor's testimony, since he was the one that examined the man first, it seems to me is important to have and it is part of Libelant's case. Now, it may be that Libelant will testify here in

court, so that we don't care about taking that deposition, maybe we will accept his testimony, but, depending on what the Libelant [5] now says in court, if he fails to produce that testimony we shall ask leave to take that deposition in Vancouver within, say, a week.

The Court: Well, what reason do you give for not having taken a deposition and being prepared to have the case set for trial? You have an equal opportunity to take the deposition with the Libelant, if you so desire.

Mr. Erskine Wood: Well, we regard it as part of their case, as to damages.

The Court: That may be true, but if his testimony is part of your case at some time it would have been different. It might be said to be part of your case to disprove his damages.

Mr. Erskine Wood: Well, it is possible that we have been dilatory in not trying to do it. As a matter of fact, I didn't learn until about day before yesterday what the situation was up in Vancouver. I think we can defer a ruling on that, but I would like to give that notice now.

The Court: Proceed with the trial of the case.

Mr. Tanner: Does your Honor care to have a general opening statement, a brief opening statement?

The Court: No. I have read the pleadings. They are simple. Unless there is something additional that you desire to call my attention to that is not contained in the pleadings. [6]

Mr. Tanner: Well, I believe I have the master

of the vessel here. I don't want to keep him waiting. It might be helpful. Captain Carlsen, will you take the stand.

LOREN CARLSEN

was thereupon produced as a witness in behalf of the Libelant herein and was examined and testified as follows:

The Clerk: Will you state your name, please.

Mr. Carlsen: Loren Carlsen.

The Clerk: Loren Carlsen.

(The witness was then duly sworn.)

Direct Examination

By Mr. Tanner:

Q. Your name is Loren Carlsen?

A. Yes, sir.

Q. And what is your occupation?

A. I am a merchant seaman. I have been employed as a master of merchant marine vessels.

Q. And how long have you been employed as a master of merchant vessels?

A. Oh, approximately two years.

Q. And prior to that time what was your work?

A. I was also employed in the merchant marine in various [7] capacities, working my way up.

Q. And you worked up through what stages, so far as ratings were concerned?

A. Well, what one starts at, as an ordinary sea-

(Testimony of Loren Carlsen.)

man, and an able-bodied seaman, third mate, second mate, chief mate, and finally master.

Q. And the time from the ordinary seaman to an able-bodied seaman requires what routine of service?

A. It varies considerably, but it can be done in several years, but in my case a period of about ten years.

Q. In your case you served about ten years as an ordinary, and then you were rated as an able-bodied seaman?

A. No, the entire time at sea.

Q. I see; the entire time at sea, you made those various promotions? A. Yes.

Q. Are you familiar, Captain Carlsen, with the use to which the timbers that were towed aft of the vessels were put? What was the purpose of those timbers while they were in use?

A. I don't quite get your question.

Q. Well, let me ask you—there isn't any dispute about this; this may be a little leading—but during the war these merchant vessels had on deck some timbers with some metal pins attached to the rear of them, did they not, [S] Captain?

A. Yes. They were called fog buoys. They weren't used very much. They were used to keep one's position in the convoy. They were trailed over the stern, several hundred yards to the stern of the vessel, and the following vessels would see the wake of the vessel. It is called a fog buoy. It is a timber, I should say, oh, about twelve or four-

(Testimony of Loren Carlsen.)

teen feet long. There were several kinds of them made. The idea of them was to create a wake in the water that was visible to another vessel.

Q. You eliminated by that the use of a fog horn that was used ordinarily in peacetime, is that right?

A. No, that was used under certain circumstances also, but convoys ordinarily kept in columns and on dark nights all vessels darkened out, the stern of the ship ahead was difficult to see, but if several hundred yards astern of that ship these fog buoys were there—it wasn't always used in fogs, but sometimes in other bad weather—why, you would see the wake of this fog buoy.

Q. You said it was twelve or fourteen feet long. Will you give us the dimensions otherwise—that is, the size of it.

A. Well, since they weren't used very much, I couldn't accurately say, except that one type was, I would say, made of, oh, either a 4 x 4 or 4 x 6 or so in dimension; and [9] they had another type that was merely a short one, several feet in length, and—well, it is quite difficult to explain the mechanics of it. It had a fin on one end of it, and that fin dug down into the water and threw a spray of water up above the surface that was quite visible for a distance.

Q. When it wasn't in use where was it ordinarily kept?

A. Well, the heavier types—they weren't extremely heavy—they were kept aft, and it was direct over the stern, so it would be stowed somewhere aft,

(Testimony of Loren Carlsen.)

depending on what space was available and on the type of the ship.

Q. On a Liberty ship do you know where they were put?

A. Well, I have seen some stowed forward of the house on the deck—that is, the afterhouse—and some were lashed overhead in some convenient distance——

Q. When they were lashed overhead, what was the clearance overhead when they were properly lashed?

A. Well, in some places they were lashed so it wasn't necessary for a person to be near it at all—I mean it wasn't in a position where anyone would have any business by it at all, but the deck above you was a gun deck on a Liberty ship, the after gun deck, and that was, oh, I would say about seven feet in height from the main deck to the——

Q. So it was lashed right up against——

The Court: Just a minute, Counsel. Let the witness [10] complete his answer.

Mr. Tanner: Excuse me, your Honor. Go ahead.

A. There was a clearance of possibly seven feet from the deck to the stiffener or beam forming the gun deck above you, roughly. I don't know exactly. This is memory.

Q. And were they lashed, when they were properly lashed, right up against the ceiling.

A. Well, they would be, they could be, but not necessarily. I mean by that that there's so many

(Testimony of Loren Carlsen.)

places that you could stow a thing on a ship, but if you did lash anything you would lash it in the clear and leave a passageway for someone. That is the general idea.

Q. Would you say that would be the ordinary and usual practice, of providing such a clearance?

Mr. Erskine Wood: Just a moment. I object to that question as too vague, and the witness has said they stow these in so many different places according to the convenience of the vessel, and I don't know just what counsel's question—

Q. (By Mr. Tanner): Captain Carlsen, when they used the bottom part or the ceiling of the gun turret to lash it, what was the usual and ordinary practice of providing clearance for men to pass aft on the ship?

A. Well, I would say any place in the stern that is frequented by the crew, even if there was a good six-foot-six [11] clearance it wouldn't be safe, because a tall person walking aft in the dark would possibly injure himself.

Q. Now, how long have you known Mr. Wilhite?

A. I have known him about four years.

Q. And have you sailed with him?

A. Yes, I sailed with—I don't know whether you want further—

Q. Go ahead, now, tell us your associations with him and how well you have known him.

A. While I was employed as a third mate on a Liberty vessel that sailed out of Portland, Mr. Wilhite was carpenter on that ship, and I think the

(Testimony of Loren Carlsen.)

voyage, counting the shore time, from my memory we left the States in June of 1942 and returned shortly after Christmas of that year—in other words, the voyage was, roughly, about seven months, counting our port time along the coast, and during that time I saw a great deal of Mr. Wilhite, because there weren't many facilities ashore for—in other words, we spent a great deal of time on the ship, and when on deck, of course, Mr. Wilhite, employed as carpenter on the ship, would be about deck a great deal. In fact, I saw him ashore many times and went ashore with him, got to know him very well and knew him very well.

Q. Now, after the conclusion of that voyage did you have occasion to see him frequently?

A. Yes, I saw him a number of times in Portland. He was [12] on one ship where I was chief mate, he was employed on some repair or alterations aboard the ship, and I saw him then, and I saw him in his home, and, oh, I would say five or six times.

Q. Now, prior to January of last year, of 1946, and prior to January 20th, do you recall when it was immediately—that is, the day of the accident that is involved in this case here, Captain Carlsen, do you know, could you tell us about how long it was before this accident that you last saw him?

A. The accident was in January?

Q. Yes, in January of 1946. That is just about a year ago.

A. I saw him some time the latter part of No-

(Testimony of Loren Carlsen.)

vember of that year. I was down in Portland for several trips. The exact date I don't know, but it must have been somewhere near the last half of the month.

Q. And what would you say as to whether or not you were well acquainted with him prior to that time?

A. Oh, yes, I knew him well.

Q. You had had occasion to converse with him on a number of occasions?

A. Yes, and when I did see him we had quite a long talk together and talked over the trips we had made—the trip we had made, and the persons we knew, and some of his shipmates, so I think I spent about an hour with him at that [13] time, the latter part of November.

Q. Now, when was it that you saw him after he was hurt?

A. I don't know exactly. It is approximately the first half of April. I returned——

Q. Where did you see him then, do you recall?

A. Oh, I saw him in his home and I saw him downtown.

Q. Now, did you notice any difference in him in his general condition?

A. At first I wasn't aware consciously, but one thing I noticed, that he—I mentioned certain persons that both of us knew quite well and he didn't seem to remember much about them; in other words, it seemed as though his memory was a little vague and that—well, just his general appearance; he

(Testimony of Loren Carlsen.)

didn't seem to be alert mentally as much as he always had been before.

Q. And how was he physically, with reference to his alertness and his general physical condition? What did you notice?

A. Well, I had known him to be very active, in fact more active than most young fellows that I know, and I noticed that he was very sluggish, and I didn't know the reason for it at the time, and, being no doctor, I could just say that I could see something had happened, I didn't know what, but I know very well that he was a different man.

Mr. Tanner: You may cross examine. [14]

Cross Examination

By Mr. Erskine Wood:

Q. Did Mr. Wilhite tell you that he had had any kind of an accident?

A. Yes, he did tell me, but not at first. He told me he had had an accident. He didn't tell me many of the particulars of it.

Q. It was after he told you he had had some kind of an accident, it was then that you got this idea that he wasn't quite as alert as previously, was it?

A. No, because he didn't try to talk to me and try to describe his condition at all. In fact, I couldn't remember where he was hurt, or what ship, or anything.

Q. Did he tell you how he was hurt, allegedly?

(Testimony of Loren Carlsen.)

A. He told me, but he couldn't have gone into much detail, because I don't even remember. I know he was struck by something. My opinion is that he was hit by something that dropped. He didn't tell me that. And, as I say, we had other things to talk about and I wasn't trying to find out just all about his accident?

Q. You and Mr. Wilhite aren't neighbors?

A. No, sir.

Q. But you have known him four years or more?

A. Well, let's see—'42—this is '47—about four and a half years. [15]

Q. What ship were you third mate on, Captain, out of Portland? A. Henry D. Thoreau.

Q. What ship were you first mate on?

A. I was first mate on several ships——

Q. I thought you mentioned one that you were first mate on with him.

A. Yes, the *Mary Kinney*, here in Portland. She was built here and I was mate on her, and we were going offshore; I was transferred two weeks later down at San Francisco.

Q. Have you had a ship of your own as master?

A. Yes, two of them.

Mr. Erskine Wood: That is all.

Mr. Tanner: Thank you, Captain Carlsen.

(Witness excused.) [16]

THOMAS EDWARD GILL

was thereupon produced as a witness in behalf of the Libelant herein and was examined and testified as follows:

The Clerk: Will you state your name, please.

Mr. Gill: Thomas Edward Gill.

The Clerk: G-i-l-l?

Mr. Gill: Yes, sir.

(The witness was then duly sworn.)

Direct Examination

By Mr. Tanner:

Q. Your name is Thomas Gill?

A. Yes, sir.

Q. And what is your occupation, Mr. Gill?

A. I am a merchant seaman.

Q. And do you have any rating in that occupation? A. Yes, sir.

Q. What is your rating?

A. Able-bodied seaman, boatswain and winch tender.

Q. Could you tell us generally what a boatswain is and where he fits into the crew of a vessel, or how he fits in?

A. He runs the deck department, the maintenance of a ship. He is the boss from the mate. He takes his orders from the chief officer.

Q. Takes his orders from the chief mate, and then he——

A. He lays out the work for the crew. [17]

(Testimony of Thomas Edward Gill.)

Q. He lays out the work for the crew. How long have you been a seaman, Mr. Gill?

A. Twenty-seven years.

Q. And how long were you an ordinary seaman before you received your rating as an A.B.?

A. Three years.

Q. Now, did you have occasion to sign on or be on the S.S. Franklin K. Lane? A. Yes, sir.

Q. In January of last year?

A. I was boatswain of the Franklin K. Lane from January 6th to the 20th.

Q. Mr. Gill, was the Franklin K. Lane equipped with a device that was towed after the vessel for use in bad weather and foggy weather, conditions that way, to create a wake?

A. Yes, sir, she was.

Q. Was equipped with that type of a device?

A. Yes, sir.

Q. Where was that device kept on that vessel?

A. It was lashed to the overhead underneath the gun deck on the fantail.

Q. When it was in proper position I will ask you whether or not there was adequate clearance for men to use the companion way in their quarters on the afterdeck of the vessel? [18]

A. When it was properly secured, it was.

Q. Now, I will ask you, Mr. Gill, if you witnessed an accident on or about the 20th of January, 1946, in which the Libelant here, Mr. Wilhite, was involved? A. Yes, sir, I witnessed it.

Q. All right, where were you when it occurred?

(Testimony of Thomas Edward Gill.)

A. I was standing just about six feet from him when he came around the house and ran into it.

Q. Do you know where he was going and what instructions he had received immediately prior to that time?

A. The mate had sent one of the sailors back to tell him to stand by the windlass, a hurry-up call.

Q. You heard that order given to Mr. Wilhite, did you? A. Yes, sir.

Q. And after he received that order what did you observe him do?

A. He started hurrying around the house, and the fog spar was down.

Q. You call that the fog spar?

A. Fog spar or fog buoy, either.

Q. Would you tell us what gait he was moving when he struck that?

A. Well, he wasn't running. He was hurrying real fast.

Q. How much had it been lowered?

A. It had been lowered about six or eight inches, so they [19] could attach some lines to it, to paint them.

Q. Now, whenever they have occasion to lower an appliance or a device of that kind under those circumstances, what are the usual and ordinary precautions that are taken, if any?

A. You usually put an obstruction there or you tie a line across so that a man can see that there is something to watch for when he is going through

(Testimony of Thomas Edward Gill.)

that area; either that or you have a man there to stand to watch it and warn people.

Q. Was there any warning given to Mr. Wilhite?

A. No, sir, there wasn't. I didn't know that they had lowered the fog buoys or I would have had a line there myself. That is one of my jobs.

Q. Do you know who lowered it?

A. No, I don't know who done it, but I had sent two men back there to paint the life buoys and they had lowered it down so they could tie the rings up with it.

Q. And there was no warning any place?

A. No, sir, there wasn't.

Q. Now, I will ask you whether or not the passageway that he was using in response to the order that he had received was a proper passageway for a member of the crew to use?

A. It was, yes, sir.

Mr. Tanner: You may cross examine. [20]

Cross Examination

By Mr. Erskine Wood:

Q. Mr. Gill, how far is it from the after deckhouse to the stern of the ship?

A. From the bulkhead of the after deckhouse to the stern of the ship?

Q. Yes, sir.

A. It is just about twenty feet, sir.

Q. About twenty feet?

A. About twenty feet.

Q. And the after gun platform extending over the fantail is about ten feet, is it not?

(Testimony of Thomas Edward Gill.)

A. About ten or twelve feet.

Q. And it was under that after gun platform that this spare buoy was suspended, was it?

A. Yes, sir.

Q. Was the after gun platform supported by channel beams or irons of some sort?

A. Under the center it has one channel iron.

Q. And the clearance, I think a previous witness testified, was about seven feet from that channel iron to the deck?

A. Yes, sir, just about seven feet clearance.

Q. And when the fog buoy, assuming it was a 4 by 6, was lashed in place it would be, you contend, tight up against the gun turret? [21]

A. Tight up against the channel iron.

Q. So that if it were lowered six or eight inches it would leave a clearance there of nearly six feet, wouldn't it?

A. A little bit better than six feet; about six and a half feet.

Q. Even when it was lowered?

A. No, when it was lowered it would be less than six feet.

Q. You said it had been lowered about six inches.

A. That would bring it down to about six feet or a little less.

Q. Now, just exactly where were you when you say you saw him hit the beam?

A. I was standing just around the port side of the house, facing aft.

Q. Facing aft?

A. Yes, sir.

(Testimony of Thomas Edward Gill.)

Q. How wide is the ship at that point?

A. It isn't very wide. There is a companion-way on each side of the ship. At that point where I was standing I will say it was about four feet from the gunwale to the house.

Q. How wide is the after deckhouse?

A. Well, I don't know. I have never measured it. I don't know the dimensions of it on a Liberty ship, right close.

Q. Isn't that passageway fore and aft on each side of the deckhouse about six or eight feet wide?

A. No, sir, it isn't.

Q. What?

A. Not at the point on the after end of the house it isn't.

Q. A man passing from the port side of the ship to the starboard side of the ship—that is what Wilhite was doing, wasn't it?

A. Yes, sir, he was going around the house.

Q. He had a passageway there about twenty feet wide to pass through, didn't he—that is, from the after bulkhead of the deckhouse to the stern of the ship?

A. Well, he wouldn't go clear around the stern. He is going right around the after end of the house, where the passageway is.

Q. There was a 20-foot-wide space he could have used, wasn't there? A. Yes, there was.

Q. Now, who gave you this order to come forward to stand by the anchor?

A. The chief officer issued an order to a sailor

(Testimony of Thomas Edward Gill.)

to call the carpenter to come back and stand by and hurry.

Q. Did you hear the order given?

A. Yes.

Q. What did you hear said?

A. He said, "The chief officer wants you by the anchor, and [23] hurry up."

Q. Was she laying at the harbor here in Portland? A. She was laying at the dock.

Q. So there was no emergency, was there?

A. I don't know. You never can tell when there is an emergency on a ship. When you are on one end you have somebody tell you to hurry and stand by something forward.

Q. At any rate, the ship was tied by a line at the dock; you admit that?

A. Yes, she was tied at the dock.

Mr. Tanner: There wasn't any storm; we admit that.

Q. (By Mr. Erskine Wood): Now, just what was Wilhite doing when he got this order?

A. I don't remember exactly what he was doing.

Q. When he received the order he started——

A. He immediately started forward in a hurry.

Q. Forward?

A. Started around the house.

Q. Why did he go around the deckhouse instead of immediately forward?

A. Because he was going up the starboard side of the ship. The ship was with the starboard side to the dock.

(Testimony of Thomas Edward Gill.)

Q. And he was standing on the port side of the ship? [24] A. Yes, right close to me.

Q. But there was a fore-and-aft passageway there on the port side for him to go forward without passing underneath this junk platform at all, wasn't there? A. Yes.

Q. Now, you as the boatswain were in charge of this work, weren't you? A. I was, yes, sir.

Q. And were these sailors that you had told to paint the life rings, were they painting them at the time?

A. They were hanging them up to paint them, yes.

Q. You saw them doing that?

A. Yes, I saw them doing it.

Q. And you saw them hanging onto this fog buoy, did you? A. Yes.

Q. Then you must have seen that the fog buoy was lowered some?

A. I didn't notice it at the time, no.

Q. Didn't notice it? A. No, sir.

Q. How do they hang those life rings over the buoy?

A. They pass a rope over the top of them and they just hang them up on the deck. That is why they had lowered the fog spar, to pass the line over the top. [25]

Q. Do you know how wide or broad the life rings are in diameter?

A. They are about 36 inches in diameter.

(Testimony of Thomas Edward Gill.)

Q. How many of them were hanging there? Approximately? I don't mean to tie you down——

A. I don't remember, but on a ship there's— there's nine altogether on a ship. That is called for by the U. S. Inspectors.

Q. Were you engaged in any particular job at the time yourself?

A. No, sir, I was not.

Q. You were just overseeing things?

A. Just overseeing the work.

Q. And, although you were overseeing things, you now say you did not notice what these painters were doing or how the fog buoy looked?

A. No, sir, I did not. The reason I didn't notice very much that day was because I had just received word that my mother had fell and broke her leg and I was trying to get off the ship.

Q. You did leave the ship on that day, I think.

A. I did, yes, sir.

Q. Now, you say that if there is not sufficient headroom in a passageway a line should be put across it? A. Yes, sir.

Q. Or a man should be stationed there? [26]

A. Yes, sir.

Q. And you saw that no line was put there or no man was stationed there at this time, didn't you? You observed that, didn't you?

A. Yes, I observed that, but I didn't think that at the time; I was too worried myself.

Q. What time did you leave the ship that day, Mr. Gill?

(Testimony of Thomas Edward Gill.)

A. It was some time right just shortly after lunch.

Q. Shortly after lunch? A. Yes, sir.

Q. And didn't come back? A. No.

Q. Well, would you say one or two o'clock is when you left?

A. I was in the U. S. Commissioner's office at two o'clock to be paid off.

Q. And that was after you left the ship?

A. Yes, sir; I ran from the ship straight up there to be paid off.

Q. Now, you say you hadn't observed that this fog buoy had been lowered six or eight inches, but you did see the man hanging the life rings to it, didn't you? A. Yes, sir.

Q. Before the accident? A. Yes, sir. [27]

Q. So those life rings were going to hang down at least 36 inches below the fog boom, weren't they?

A. Yes, sir.

Q. They necessarily would obstruct any passageway there?

A. No, sir, they didn't. They were hung from the after end of it.

Q. How far away from the deckhouse were they?

A. Well, I will say about four or five feet.

Q. Four or five feet? A. Four or five.

Q. So there was a clear passageway next to the deckhouse, unobstructed by any life rings, and with a headroom of approximately six feet, wasn't there?

(Testimony of Thomas Edward Gill.)

A. I don't know exactly how far the buoys had been lowered down.

Q. What?

A. I don't know how far the buoys had been lowered down.

Q. Well, I don't care how far they were lowered down. You said they were tied up close to the fog buoy and they were 36 inches in diameter; but what I mean, if they were five feet away from the after bulkhead of the deckhouse there was at least five feet of passageway there of approximately six feet, wasn't there?

A. There should have been, yes. [28]

Mr. Erskine Wood: That is all.

Mr. Tanner: Thank you.

(Witness excused.)

BENJAMIN N. WILHITE

the Libelant herein, was thereupon produced as a witness on his own behalf and was examined and testified as follows:

The Clerk: Your name is Benjamin N. Wilhite?

Mr. Wilhite: Yes, sir.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. Tanner:

Q. Your name is Benjamin N. Wilhite?

A. Yes, sir.

(Testimony of Benjamin N. Wilhite.)

Q. And you are the Libelant in this case, are you? A. Yes, sir.

Q. Mr. Wilhite, how old are you?

A. Sixty-two.

Q. What is your occupation?

A. Carpenter.

Q. How long have you been a carpenter?

A. Off and on, for forty years.

Q. For forty years; and have you done your carpenter work [29] in the maritime industry?

A. I was on a ship, off and on, since '42. That was all I was——

Q. You started to go into the maritime industry with your skill as result of the war, is that right, Mr. Wilhite? A. That is right.

Q. But prior to the war you worked at what job of carpenter work?

A. Well, superintendent, mostly, of construction.

Q. Of construction work? A. Yes.

Q. Now, Mr. Wilhite, you went into the maritime work in 1942?

A. That is right.

Q. And what was your first employment there, on what vessel? A. The Henry D. Thoreau.

Q. You were on that vessel for how long?

A. Approximately seven months.

Q. And then you were on what other vessel?

A. The Wide Awake.

Q. What? A. The Wide Awake.

Q. You were on the Wide Awake? A. Yes. [30]

Q. Then what was your next assignment?

(Testimony of Benjamin N. Wilhite.)

A. The Franklin K. Lane.

Q. The Franklin K. Lane; and that is the vessel that is involved in this hearing?

A. That is right.

Q. Were you engaged as a carpenter on all of those vessels? A. Yes, sir.

Q. And did you sign on as an A.B. or Ordinary? What did they give you?

A. Well, just the rating of a carpenter, I guess.

Q. They just gave you the rating of a carpenter and to do the carpenter work?

A. That is right.

Q. Now, Mr. Wilhite, just immediately prior to the time you got hurt, just before that time, when you were on the Franklin K. Lane, what were you doing?

A. I was looking after my work back there, checking up on—I did oiling on some of these—I forgot what the boys call them. They use them to moor the ship up. They are a pulley, I call them—and I was checking on them and seeking everything was in order so as to get ready to go.

Q. You were getting ready to sail on another voyage, is that right? A. That is right. [31]

Q. All right, now, Mr. Wilhite, what orders did you get while you were doing that?

A. Well, I was back aft and one of the seamen came and he came down the starboard side and hollered at me and said the mate wanted me forward to stand by the winch immediately, so I dropped what I had and I started.

(Testimony of Benjamin N. Wilhite.)

Q. And what happened?

A. I came in contact with this beam.

Q. You came in contact with this beam. How many steps would say say you had taken before you came in contact with it?

A. Oh, not very many. I don't remember.

Q. Well, about what distance would you say you think you went?

A. Well, the aft of the ship, there's about thirty feet there at that point, so I imagine about two or three steps, something like that.

Q. You had just got started?

A. That is right.

Q. All right, what part of your body came in contact with it?

A. Just the back of my head there.

Q. Just your head?

A. Right there, yes (indicating).

Q. And what happened, would you tell us? Did it stop you, [32] or what happened?

A. Well, I staggered for a few minutes, and the boys laughed at me, and, as near as I can remember, I made it up to the anchor all right, but I was pretty dazed. I didn't say anything, because I really wanted to make the trip. It was going to the East, and I never had been over in that part of the country and I wanted to make the trip, and I kept still as much as possible.

Q. How did you feel?

A. Well, I felt pretty dizzy, but it was late in the evening and we knocked off pretty soon, as

(Testimony of Benjamin N. Wilhite.)

quick as we got away from shore, and I went to my bunk and I stayed there that night and most of the next day.

Q. When did you arrive up at Vancouver, do you know?

A. We left here along late in the afternoon, I would say about four or four-thirty, and we got in Vancouver, B. C., the following night—the following night—well, it would be in the morning, approximately two-thirty in the morning.

Q. Were you able to do any work?

A. No, nothing to amount to anything, only just what I thought had to be done.

Q. How did you feel on the way up?

A. Oh, I had an awful headache and high heart, I wasn't able to do anything, but I was determined to stay on the [33] ship and I just hung on, that is all.

Q. All right, when you got up to Vancouver what did they do?

A. Well, my head got to hurting me and I told the mate about the deal and, well, he told me just to lay around and not work any. He said, "Maybe you will get to feeling better." But finally they decided to send me to a doctor, and I went up to the doctor and he said, "The only thing I can do is send you to a hospital." They sent me up there that afternoon and I stayed that night, if I remember right, and the next day along in the afternoon they taken an X-ray of me or two and put me back in my bunk, and, well, I got tired of staying there,

(Testimony of Benjamin N. Wilhite.)

I wanted to get back to the ship, so while I was out——

Mr. Erskine Wood: I didn't hear that answer.

A. What?

Mr. Erskine Wood: I didn't hear it.

Mr. Tanner: Speak up a little louder.

A. I got tired of lying there in the hospital. There was a fellow that had consumption lying there right close to me and I didn't like it, I thought I would get somewhere else, so I went back to the ship—I dressed and beat it out of there. They didn't know it.

Q. How did you feel? [34]

A. Well, I was pretty dizzy. I had a time getting back to the ship. I finally got hold of a cab and he taken me back, and the next morning—I don't remember whether I stayed on the ship all that day or the next day, but the doctor pulled me off one day or two after that, I don't remember which, but he pulled me off, wouldn't let me go any farther.

Q. The doctor did?

A. That is right. He told me, he said, "You can't go."

Q. Now, if he hadn't told you that you couldn't go would you have gone?

A. Why, sure, I was trying to scheme every way I could to go.

Q. When you left the ship, then, where did you go?

A. Well, they told me to come back to Seattle

(Testimony of Benjamin N. Willhite.)

or I could come on home. Well, I started to come on home; I got as far as Seattle, I got sick again, so I got me a cab and went to the hotel that night and I stayed there until the next day, I slept late and stayed there until the next day, and got home the next night, two days later.

Q. How were you feeling there in Seattle?

A. Pretty tough.

Q. And then where did you come? Where did you go?

A. I stayed there at Seattle until along about noon, I think, [35] I caught the train and got in home here along about—well, it was along late in the evening some time.

Q. And how was your condition when you got home? A. Well, I went right to bed.

Q. Did you go see a doctor?

A. Yes. I came down to the Union Hall and asked them advice and they sent me up to the Public Health.

Q. That is here in Portland?

A. That is right, in this building.

Q. And you came up to the Public Health then. Do you know about when that was after you got back from Seattle?

A. I think it was the next day or so.

Q. Within a day or two you were up to see the doctor? A. I don't remember the time.

Q. What did you do then?

A. Well, he advised me to lay around and keep quiet. "That is the only way," he says, "it will

(Testimony of Benjamin N. Wilhite.)

do you any good." So that is what I did. I came down a time or two. He had appointments with me and I came down a few times, and he finally sent me up to Dr. Lucas, I think, to have my eyes examined. So I never had said anything to Dr. Lucas, and I asked him about my eyes, told him I had never wore glasses. "Well," he says—he made the remark, asked me if I had had any bumps or anything, and I told him I had. I just wanted [36] to see if he would know before I told him. I told him about it then.

Q. He asked you if you had been hit on your head?

A. Yes, he asked me if I had had any bumps lately, and I told him yes, told him how that happened to be there.

Q. Now, tell us, Mr. Wilhite, how your condition was following that period, over the next several months? How was your condition?

A. Well, it hasn't been very good, and it isn't good yet.

Q. Well, what has been your trouble?

A. Oh, my head is—of a night—and that is something I never do have is a headache, I never did have it. I used to make fun of my daughter about her having a headache, and I never did have the headache, but I have had the headache pretty near continuously. Once in a while it will let up. If I get out and kind of mosey around for a while it will leave me for a while, but it comes right back on me again.

(Testimony of Benjamin N. Willhite.)

Q. Did you have any of that kind of pains or that kind of trouble before this accident?

A. No, I never was sick a day in my life.

Q. Your health had always been good, had it?

A. Absolutely.

Q. Are you able to do something now, some work?

A. Well, I can work for a little while but then it comes [37] right back onto me again. I can work for a day or two, but I begin to have that feeling come back onto me.

Q. What feeling is it?

A. Well, it seems like it is just something pulling right on the back of my head here, like it is sliding it down. It is a real deep pain right in the back of my neck, the cord right in there (indicating).

Q. Do you have any abnormal sounds, or anything like that?

A. Yes, a buzzing. My head buzzes quite a lot.

Q. Any other sensations or feelings that you have?

A. No, nothing, only my eyes bothers me.

Q. I mean in your head?

A. No, nothing only a headache, a dull feeling, and buzzing. My head gets to buzzing, it wakes me up in the night.

Q. It interferes with your sleep?

A. Yes.

Q. Now, is it getting any better, or what do you say as to that?

(Testimony of Benjamin N. Wilhite.)

A. Well, I suppose it is getting some better, but it still is a long ways from like I was. I get off of balance quite a lot.

Q. Have you had some trouble with your eyesight? A. Never did.

Q. Before this you never had any? [38]

A. No, sir.

Q. Have you had any since?

A. Well, yes, my eyes, I can notice that I can't read without glasses any more, and before I never did use glasses.

Q. What were you earning at the time of this accident? A. Earning?

Q. Yes.

A. My voyages had been earning me about three-fifty a month.

Q. That was your rate of pay at the time of the injury?

A. Well, it wasn't my rate, but with the over-time and everything it generally amounted up to over three hundred dollars a month.

Q. Well, that is what I mean. Now, do you know how much money you have lost as result of not making that trip or not being able to work at your trade?

Mr. Erskine Wood: I think I will object to that question.

The Court: Sustained.

Mr. Erskine Wood: It will depend on how long——

The Court: Sustained.

(Testimony of Benjamin N. Wilhite.)

Q. (By Mr. Tanner): Do you know how long that vessel was at sea before the crew came back and was paid off?

A. No, I don't. I understood they came back from New Orleans in a few months. They made a trip to Algiers and back to [39] New Orleans and some of the fellows were paid off and some stayed on, but I figured on staying on at least a year, or I had taken enough equipment to stay a year.

Q. I will have a witness here who stayed on that trip. Now, when was it, Mr. Wilhite, that you were able to do some work? You say you are able to do some things now. When was it that you were able to do some work?

A. It must have been four months after that before I done anything.

Q. It was four months before you did anything?

A. That is right.

Q. And then after that four months what work were you able to do?

A. Oh, I went out and would kind of walk around and kind of help some fellow out at building, just kind of superintending. I didn't do any work to amount to anything.

Q. At the present time how much work can you do?

A. Not very much. Two or three days is all at a time. If I didn't get the week ends off, Saturday and Sunday, I wouldn't be able to carry on.

Q. Could you tell us about how much time since you got hurt, altogether, that the time that you

(Testimony of Benjamin N. Wilhite.)

have worked would be? What would you say as to that, as to about how much since this accident you have actually worked? How much time would you [40] say you have put in?

A. I couldn't tell you exactly. I never kept no account of it.

Q. You didn't keep a record as to the——

A. No. It wasn't very much.

Q. Do you find trouble doing part of the work that you formerly did without any trouble?

A. Oh, I couldn't do superintendent's work. I have tried that a time or two.

Q. What part of the work do you have trouble doing?

A. Well, I just can't follow through a blueprint, that is all. I can't remember enough to go ahead with it. I have had several jobs offered me, but I couldn't carry it on.

Q. You say you have had several jobs that you couldn't take? A. That is right.

Q. Let me ask you, have you had any what the seamen call maintenance, or any pay at all, from the steamship company?

A. They paid me for what time I was on there, yes.

Q. How is that?

A. They paid me for what time I was on there, yes.

Q. The time that you were on the ship?

A. Yes, that is right.

Q. But I mean after you left the ship—— [41]

(Testimony of Benjamin N. Willhite.)

A. Nothing.

Q. ———did you have any what is known as maintenance? A. No, nothing.

Q. They gave you nothing after you left the ship?

A. That is right. I believe that the attorney down there did promise me some money, but he never did send me any so I never went after it.

Mr. Tanner: I would like to have this marked as Libelant's exhibit.

(Abstracts from Medical Record, so produced, was thereupon marked for identification as Libelant's Exhibit 1.)

Mr. Tanner: We offer it, Mr. Wood. It is the Clinical Abstract.

The Court: Is there any objection to the offer?

Mr. Erskine Wood: I think that under a Federal statute this bears a seal and, therefore, is admissible, but it is on the understanding that under the heading "Condition of Patient Upon Admission" the narrative there is merely what the patient told the Public Health.

The Court: Well, the question is, do you or do you not have an objection to the admission of that in evidence?

Mr. Erskine Wood: I have no objection to it.

The Court: Very well, it is received in evidence without [42] objection.

(The said Abstract from Clinical Record, so offered and received, having previously been

(Testimony of Benjamin N. Wilhite.)

marked for identification, was thereupon marked received as Libelant's Exhibit 1.)

The Court: The Court will stand in recess for ten minutes.

(A short recess was thereupon had.)

Q. (Mr. Tanner): Now, Mr. Wilhite, have you been examined herein Portland by a number of physicians? A. Yes, sir.

Q. In addition to the ones that you have mentioned? A. That is right.

Q. At whose request did you submit yourself for an examination?

A. By the insurance company.

Q. Well, by the company, you mean?

A. Yes, by the company. Yes, that is right.

Q. Do you know what doctors the company sent you to?

A. Doctor—Gee, I can't think of the name.

Mr. Erskine Wood: I can supply the name, if you want me to.

Mr. Tanner: Well, Dr. Raaf? [43]

A. Dr. Raaf, that is right.

Q. Now, Mr. Wilhite, let me ask you this question: At any time before you were hurt did you get any notice or any warning that this timber had been lowered? A. No, sir.

Mr. Tanner: I think you may inquire.

(Testimony of Benjamin N. Willhite.)

Cross Examination

By Mr. Erskine Wood:

Q. Mr. Willhite, I will take up first your testimony about your earnings. You said you earned three hundred and fifty a month, and then you later cut that down to about three hundred a month, but your rate of pay on the ship was \$157.50 as carpenter, was it not, plus \$7.50 for the rent of your tools? A. Ten dollars, I think.

Q. I happen to have looked up the Articles. Isn't it \$165, your total take for the month?

A. Well, there is a lot of overtime, see.

Q. Yes.

A. I was basing that on the monthly earnings on the other ships. That is about what they paid, between three and three-fifty.

Q. Yes, but on the other ships, you were working on them earlier and in the war period when they were paying more overtime [44] and more bonuses, isn't that true?

A. Well, no, not on the second ship I didn't get any bonus.

Q. But you have no record of your overtime, have you? A. No—I do at home, yes.

Q. Are you going home at noon? Could you produce that, that record of your overtime?

A. I have—I don't know whether—I have got my seaman's book here. I don't know. Maybe my pay is here. I think the first trip I made to Aus-

(Testimony of Benjamin N. Willhite.)

tralia was seven months—I think that paid about \$700 a month.

Q. That was in 1942, though?

A. That is right.

Q. When the war was on they paid big bonuses for——

A. Then the one I made to Manila, I think that was pretty close to three-fifty.

Q. Well, what year was that in?

A. That was in October, September—let's see, August, September and October, or September, October and November.

Q. Of what year? A. '45.

Q. '45. That voyage began in August, '45?

A. What?

Q. Let's see—that voyage began in August, '45?

A. Sometime in there. I don't remember just exactly. [45]

Q. So the war was still on then, wasn't it?

A. '46 I am thinking about. '46 it was, in place of '45.

Q. Well, you have no record of any overtime on this ship, have you?

A. I don't think there was much overtime. I hadn't been on very long. You generally get your overtime after you get out to sea.

Mr. Tanner: I didn't get that last answer. When do you get the overtime?

A. Mostly at sea.

Mr. Tanner: At sea? A. Yes.

Mr. Erskine Wood: I would like to go back to

(Testimony of Benjamin N. Wilhite.)

the beginning of your testimony. Did you say you have been a carpenter for forty years?

A. Yes, sir, off and on.

Q. And what other occupations have you followed?

A. Oh, I have followed farming and superintending and construction work.

Q. You have been in the real estate work, too, haven't you?

A. I had a few houses that I got in the Hoover Administration that I had to get rid of, so I tried to sell for myself.

Q. How long were you in the real estate business?

A. I think I carried a license a few years. [46]

Q. How long were you farming?

A. Well, I never kept any particular time. I would farm and then I would retire from farming and go to building.

Q. Where did you farm?

A. I had a farm in Missouri; I had a farm down in Toledo County (sic) in this state; I had a farm in Minnesota.

Q. Did you farm a good many years?

A. I had a farm, but I did a lot of carpenter work outside of farming.

Q. How long have you lived in Portland?

A. Off and on, since '16, 1916.

Q. Do you have any intention of trying to go to sea again?

A. I would like to go if I could——

(Testimony of Benjamin N. Wilhite.)

Q. How?

A. I would like to go if I could get so that I could, yes. I love to travel.

Q. You would prefer that to being a carpenter on shore, would you? A. Yes.

Q. To get a job, though, you would have to maintain your Union membership. I would like to ask you if you have done that? A. No.

Q. I draw the inference, then, am I right, that you have [47] no intention of going back to sea?

A. Yes, as quick as I get dismissed from this, from the doctor, why, I will go back.

Q. Now, how long had you been on this particular vessel before you were hurt?

A. I went to work the 3rd of January and they paid me off the 29th.

Q. You now say that you were hurt on the 20th, do you? A. That is right.

Q. So you had been on the vessel plenty of time to familiarize yourself with it, hadn't you?

A. Well, it was laying in dock here and we merely reported in the morning and were dismissed.

Q. Do you mean to say you didn't do any work on it during——

A. Well, nothing unless it was just some little something that the mate would ask us to do and then we were dismissed.

Q. You were thoroughly familiar with the lay-out and the situation back there at the stern, were you not?

A. Oh, yes; the Liberty ships, I knew them.

(Testimony of Benjamin N. Wilhite.)

Q. What?

A. I knew the Liberty ships, yes.

Q. And you were doing some kind of work back there this day, but you don't remember just what it was?

A. We were getting ready to go to sea, you see, and we were [48] supposed to sail that morning, but we didn't sail until late that afternoon.

Q. Do you know how long you had been working back there at the fantail?

A. No, I don't know.

Q. Approximately?

A. Well, I wouldn't know. I don't remember.

Q. Well, I mean, had you been there a couple of hours, or fifteen minutes?

A. No, I don't think so, because things was kind of all in a muss there. The boatswain was getting off; he was trying to get loose from the ship.

Q. Give us your best estimate of about how long you had been back there?

A. Not very long. I would say just a few minutes.

Q. Now, you saw these sailors painting the life rings there, did you?

A. I don't believe they were painting during that time. They might have been.

Q. What were they doing? Hanging them up?

A. They were already hung up.

Q. You saw that?

A. Yes, I remember seeing the life rings up.

Q. And when you got this order to go forward

(Testimony of Benjamin N. Wilhite.)

to the anchor, [49] just tell us again how you walked or what you did. You said you didn't run. You walked, didn't you?

A. Well, I always walked at a good, stiff walk. I never was slow at walking.

Q. And did you look where you were going?

A. I was looking down, because there was something laying on the deck I had to step over.

Q. What was it?

A. I don't remember what it was. There was something laying there on the deck, right below the life rings. There was a lot of litter on the deck. They generally clean them up after they get to sea.

Q. Well, now, what was it? Was it litter, or was it a pipe, or what was it?

A. Well, I don't remember. I couldn't say. I just don't remember what it was.

Q. And how many steps had you taken before you hit your head? Approximately, I mean?

A. Oh, three or four, something like that.

Q. And did you stoop to go under this thing?

A. No. I generally walk pretty straight, but you wore a seaman's cap, you know—I always wore a seaman's cap.

Q. You didn't stoop to go under it?

A. No; I never walk with a stoop. [50]

Q. I didn't mean habitually. I mean you didn't duck your head to go under it? A. No.

Q. You saw the life rings hanging there?

(Testimony of Benjamin N. Wilhite.)

A. Yes, sir, that is right. There was a space between the life rings. They left it there.

Q. What do you suppose they were hanging from?

A. I don't know that I noticed. In fact, when I walk I look down all the time. I hardly ever look up. I am a great hand to look where I am stepping.

Q. As you approached the fog buoy and the life rings you took your hands to part the rings, didn't you, so you wouldn't get paint on you, didn't you?

A. No; there was a space, I would say, about that wide, a passageway through.

Q. You didn't do anything to the life rings to keep from getting paint on you? A. No.

Q. And you didn't duck your head?

A. No.

Q. And you walked straight forward?

A. Well, I generally do. I don't just remember what position——

Q. And you didn't stoop? [51]

A. No.

Q. Well, how did you hit the back of your head?

A. Just the top of it, like that (indicating). You see, the bottom was lashed down on the forward end of it. The forward end of it was laying on a vent that comes from a toilet on the stern of the ship. That is where the soldiers or the Navy crew stay, and that was laying on top of that. One end was lower, you see, than the other.

Q. One end was what?

(Testimony of Benjamin N. Wilhite.)

A. One end was lower. It was kind of on a slope, you see.

Q. You mean the forward end was lower?

A. That is right.

Q. And is that the end you hit on?

A. That is right.

Q. How tall are you?

A. I am five feet eleven and a half inches.

Q. Five feet eleven and a half inches; so, without stooping, and walking erect, you just barely hit the top of your head, is that it?

A. Well, it hit me enough to stagger me quite a bit.

Mr. Erskine Wood: Well, that isn't an answer. I move to strike that answer.

Mr. Tanner: I resist that motion.

The Court: The motion is denied. [52]

Q. (Mr. Erskine Wood): I say, it is a fact, is it not, that, without stooping, and walking erect, you hit yourself on the top of your head; is that right?

A. Yes, I caught it on the back of my head. You see, I was looking, I kind of turned, down to this to step over it. I don't remember what was there. The deck was strewed with all kinds of stuff anyway.

Q. Such as what? Rope, or——

A. Oh, lines and, oh, different kinds of stuff that they use on the ship.

Q. Different kinds of stuff that you see in use on a ship—is that what you said?

(Testimony of Benjamin N. Wilhite.)

A. Well, there's no line back there. The lines were stowed forward, more forward than this.

Q. How long had these sailors been there painting these rings or getting ready to paint them?

A. I don't know. I didn't have nothing to do with them.

Q. Had they been there all the time that you were there? A. I couldn't say to that.

Q. How did you know that this was slanting a little bit downward, forward?

A. I went back and looked at it after I got hurt.

Q. How long after?

A. Oh, I would say half an hour, something like that; after [53] I got relieved from the anchor——

Q. You went back then and looked at it?

A. Looked it over, yes. I mentioned it to the boatswain.

Q. When you bumped your head did you break the skin on your scalp?

A. No, sir, it was a funny thing, it didn't, but my skin was awful sore. I couldn't stand to use a towel on my head.

Q. But you didn't draw blood?

A. No, I didn't break the skin on my head. I hit it more flatways.

Q. And you didn't fall down, did you?

A. No. It got me down pretty well, though.

Q. You were not knocked unconscious?

A. No, I wasn't unconscious.

Q. And you didn't fall to the deck?

(Testimony of Benjamin N. Wilhite.)

A. No.

Q. What time of day do you claim this happened? A. It was in the forenoon.

Q. In the forenoon; can you approximate the hour?

A. Oh, I wouldn't say just what time it was. There was a big rush around there. I never paid any attention to the time. Sometime after coffee time.

Q. I believe you said the boys laughed about your accident? A. They did. [54]

Q. What boys were those?

A. Oh, some of the seamen. You see, they were all new; everybody was new at that time.

Q. You mean some of the fellows that saw it happen?

A. Oh, yes, they laughed. They always do laugh at such things as that.

Q. Did the boatswain laugh about it?

A. Oh, yes.

Q. When you went back and examined this fog buoy after you had done your work forward how much did you find it had been lowered?

A. Well, if I had been walking perfectly straight it would just about hit me at the forehead, just about there (indicating).

Q. Well, how much does that mean it had been lowered?

A. Oh, I never measured how far it was down, but it was more than—there was two of them hanging there, see.

(Testimony of Benjamin N. Wilhite.)

Q. But one of them was down?

A. Only one. They had lowered one end to tie their life rings on it.

Q. Had they tied their life rings to the lowered end? A. That is right, there alone.

Q. Well, now, Mr. Wilhite, you have said that the forward end was the lowered end. [55]

A. That is right.

Q. And you also testified that there was a free passageway there of four feet or so without any life rings on it.

A. There was a passageway. I wouldn't say it was four feet. I would say just about that much; just enough for a fellow to get through. There was life rings hanging on both ends, both sides of it.

Q. Well, then, was that four-foot passageway next to the deckhouse?

A. No, I mean about four feet—about three feet, three and a half to three feet, between the life rings, just enough for a man to get through.

Q. That is what you found when you went back? A. No I went through.

Q. That much you did observe there?

A. Oh, yes.

Q. In other words, as you approached this thing, before you got hit, you saw a space three or four feet wide between the life rings, which you attempted to go through?

A. I will say thirty inches.

Q. I say, you saw that before you got hit?

(Testimony of Benjamin N. Wilhite.)

A. Yes; I was looking for a place to get through.

Q. Did you see the fog buoy at that time before you got hit? [56]

A. No, I never.

Q. What?

A. No. I presumed it was up. They generally keep things up and out of the way.

Q. Well, if you didn't see it what did you think these life rings were hanging from?

A. I never paid any attention to what they were hanging from. I was in a hurry.

Q. When you got to Vancouver you complained of a headache and you went to the Catholic Hospital, the St. Paul's Hospital, didn't you?

A. Yes.

Q. Was the doctor there, Dr. Fred Hogan?

A. I don't know what his name was. I didn't go right direct to the hospital; I went to his office in the Custom—they sent me to the Custom House. That is where his office was.

Q. And from there you went to the hospital?

A. He sent me to the hospital. I went back to the ship and got to the hospital about night.

Q. You got to the hospital the same day you left the ship?

A. Yes.

Q. And that was the 24th of January, was it?

A. I don't remember the date.

Q. Did you stay in the hospital that night? [57]

A. I did.

Q. And you left the hospital the next morning?

A. No.

Q. When?

A. Late that next night.

(Testimony of Benjamin N. Wilhite.)

Q. Late the next day?

A. That is right.

Q. Because you didn't like the conditions there?

A. That is right.

Q. How is that? A. That is right.

Q. And you never returned to the hospital, is that right? A. No.

Q. You were not discharged from the hospital; you left yourself?

A. I left myself. They only wanted to take an X-ray and they was done with me, as far as that was concerned.

Q. How do you know what other examination they may have wanted to make?

A. Well, he told me that he was going to send me back to Seattle, the doctor did.

Q. But you were not discharged from the hospital; you walked out; isn't that a fact?

A. That is right. [58]

Q. Well, then did you go back to the ship?

A. Yes, I taken a cab and went back to the ship.

Q. And how long did you stay on the ship?

A. I don't remember that either.

Q. I don't mean hours; I mean days.

A. I think I stayed there the next day and the Seaman's Local Business Agent was down there looking for me, and I can't just exactly figure it out, but—I know as I can tell you just exactly the——

Q. What do you mean by saying you were

(Testimony of Benjamin N. Wilhite.)

pulled off the ship? Who pulled you off? The Business Agent? A. The doctor.

Q. Which doctor?

A. This doctor. I don't know just what his name was.

Q. The same one you had gone to first?

A. Yes.

Q. And what did the Business Agent have to do with it?

A. Well, I don't know where he came in at it. I couldn't say. I guess he got it from the doctor, or something.

Q. Well, do you know whether it is a fact or not that the Business Agent of the Union was anxious to take you off the ship to create a vacancy for another man?

A. No, I don't think so.

Q. You have no reason to suspect that? [59]

A. Well, the doctor was the first that pulled me off, see. He wrote a slip of paper and told me to give to the captain, and that was the time that the captain told me that I had to go to the hospital in Seattle.

Q. And you don't know what doctor that was?

A. It was the doctor at the Custom House. I think it was the same doctor I went to the first time.

Q. Did you go to more than one doctor?

A. No; there was two in the office and they both talked about it there.

(Testimony of Benjamin N. Wilhite.)

Q. And you don't know the names of the doctors? A. No, I don't.

Q. If I said Dr. Fred Hogan, that wouldn't refresh your memory?

A. It wouldn't make any difference to me, if you named him; I wouldn't know one from the other.

Q. You were paid in full up to the time you left the ship, weren't you?

A. That is what the Consul demanded.

Q. Were you paid off before the American Consul? A. That is right.

Q. You signed off by mutual consent, did you?

A. Well, that is the way they made it, but I didn't make any objection. Of course, I couldn't, because the captain [60] dismissed me after the doctor pulled me off the boat.

Q. Mr. Wilhite, did you, before the American Consul, sign off the articles by mutual consent?

Mr. Tanner: Now, I object to that. He can state the facts, but that is a conclusion as to what is mutuality.

Mr. Erskine Wood: Well, I don't think——

The Court: Well, I don't think so. I think it is obvious the man was given medical attention and was paid off and left the ship. He wasn't forced off the ship. There is nothing about any force about it. Apparently his testimony is true, he left the ship because he was injured—he probably didn't desire to be ill—and that was the reason he didn't

(Testimony of Benjamin N. Wilhite.)

make the voyage. Overruled. I think it is a matter of detail.

Mr. Erskine Wood: Will you read the question to him.

(Pending question read.)

A. Well, I suppose you would call it that, yes.

The Court: Well, what objection, if any, did you make to signing off the articles at that time?

A. Well, I didn't want to sign off.

The Court: Well, what objections did you voice?

A. Well, I don't understand you.

The Court: What did you say about not signing off in the American Consul's office? [61]

A. I told him the circumstances and showed him what the—told him what the doctor told me, and I said, "I guess that is the only thing I can do, I guess." He said, "You can go to Seattle, that is all."

The Court: The American Consul told you that is the only thing you could do?

A. That is right.

The Court: You were not in physical shape to make the voyage and do your work, were you?

A. I wasn't in physical shape to do it.

The Court: Proceed.

Q. (Mr. Erskine Wood): Just a moment. Mr. Wilhite, last June you gave some testimony about your accident, didn't you?

A. Yes, sometime last summer.

Q. And didn't you then testify that as you approached this passageway you used your hands to

(Testimony of Benjamin N. Wilhite.)

part the life rings because you wanted to get through there without getting paint on you?

A. Well, there was room left there, but I might have put my hand up to part them a little, but there was that much room between the life rings.

Q. Well, you did testify that way, didn't you?

A. I might have, yes. I don't remember.

Mr. Erskine Wood: That is all. [62]

Mr. Tanner: That is all, Mr. Wilhite.

(Witness excused.)

The Court: Call your next witness.

KONSTANTINE GEORGE

was thereupon produced as a witness in behalf of the Libelant herein and was examined and testified as follows:

The Clerk: Will you state your name.

Mr. George: Konstantine George.

(The witness was then duly sworn.)

Direct Examination

By Mr. Tanner:

Q. Your name is Konstantine George?

A. Yes, sir.

Q. And what is your occupation?

A. Well, right now I am preparing to go to school, to college. At one time my occupation was a seaman. Previous to that I was a student.

(Testimony of Konstantine George.)

Q. All right, when did you first start to go to sea? When did you first have seafaring experience?

A. Well, I joined the maritime on September 23, 1944. [63]

Q. In September, 1944? A. Yes.

Q. Now, in what capacity did you first obtain employment?

A. I first obtained employment as a radio operator on board a ship.

Q. And did you have occasion to go aboard the Franklin K. Lane?

A. I did go aboard the Franklin K. Lane. I made arrangements with the Coast Guard and the Union and a friend so we could sail together,—since the war was over, we were in the capacity of ordinary seamen—so in doing so we could be on the same ship and make one trip together.

Q. Were you aboard the Franklin K. Lane with Mr. Wilhite? A. Yes.

Q. Did you get acquainted with him?

A. Yes, I did.

Q. Mr. George, what was his condition, so far as you observed and within your knowledge, from the time the Franklin K. Lane left Portland until it got up to Vancouver, British Columbia?

A. Well, I will say that I didn't see much of him up to there, but what I did see of him—I didn't see him do any work aboard the ship, and—well, before that, I don't know, he used to have a certain little shuffle. We used to always talk in the mess hall together, and I would just talk back [64] and

(Testimony of Konstantine George.)

forth, just joking back and forth, nothing serious, nothing meaning any business, just passing the time of day,—and he seemed a little bit different—well, to tell you the truth, I couldn't say why, but I did know that he had hit his head,—I didn't see it or anything—and, the only thing, he mentioned pains, he mentioned it to the mate and the crew, and he had been laying up in his fore-castle.

Q. You mean he had been disabled during that trip, is that correct? A. Yes.

Q. Now, you continued on the trip, did you not?

A. Yes, I did.

Q. State whether or not that boat—how that trip was as to the question of overtime? Was it a good overtime ship or poor overtime ship? What do you say as to that?

Mr. Erskine Wood: I object to that, your Honor. That is too vague, your Honor.

Mr. Tanner: Oh, I think not, your Honor. They have ships that have overtime and some that don't, depending on the master.

The Court: Oh, I think I will sustain the objection.

Q. (By Mr. Tanner): I will ask you to state whether or not during the course of that trip you saw the carpenter working [65] overtime, the ship's carpenter working overtime, during that trip?

A. Yes, he did. He worked quite a bit of overtime, in fact, owing that that ship was a pretty good ship for overtime as far as the crew was concerned.

(Testimony of Konstantine George.)

We done a lot of work, because the ship was converted——

The Court: Now, just a minute. You have answered the question. The portion of the answer that the ship was a good ship for overtime as far as the crew was concerned is ordered stricken as being not responsive and a voluntary statement of the witness.

Mr. Tanner: I think you may cross-examine.

Mr. Erskine Wood: That is all.

(Witness excused.) [66]

CHRISTINE WILHITE

was thereupon produced as a witness in behalf of the libelant herein and was examined and testified as follows:

The Clerk: Your name, please?

Mrs. Wilhite: Mrs. Wilhite.

The Clerk: What is your first name?

Mrs. Wilhite: Christine.

(The witness was then duly sworn.)

Direct Examination

By Mr. Tanner:

Mr. Tanner: May it please the Court, could I ask at this time for a stipulation of counsel as to when the ship paid off back in Portland? How long the trip lasted? I neglected to ask the prior witness. I can ask him where he sits. If counsel knows it.

Mr. Erskine Wood: I don't know it myself.

(Testimony of Christine Wilhite.)

Mr. Tanner: Could I have leave to ask the witness George as to when the ship came back?

The Court: You can finish with the witness on the stand and recall the witness.

Mr. Tanner: Thank you, your Honor.

Q. You are Mrs. Wilhite, are you not?

A. Yes, sir.

Q. And how long have you been married to Mr. Wilhite?

A. Oh, I will say forty-two years. 1904 is when we were [67] married.

Q. All right.

A. So you will have to figure that out. I forget.

Q. I just want to ask you two or three questions. How was his health before he got hurt on the Franklin K. Lane, Mrs. Wilhite?

A. He was just fine.

Q. Now, when did you see him, Mrs. Wilhite, after he—when was it that you first saw him after this injury? A. It was when he came home.

Q. And about when was that? Do you recall the date?

A. Well, I really can't remember the day, I really can't, but anyhow—

Q. What was his condition when you did see him, when he came home?

A. Well, he certainly—almost fell to the floor.

Q. Well, just go ahead and tell us why.

A. His eyes was red and his head was red. He was in an awful condition physically.

Q. What did you do for him?

(Testimony of Christine Wilhite.)

A. Well, he just went to bed.

Q. Now, how has he been since, Mrs. Wilhite?

A. Well, not extra. Pretty good, but not to say too good.

Q. What have you noticed about him that is different than [68] he was before this accident?

A. Well, he seems to have such awful headaches, and he is unreasonable, and he is quite different; never saw him that way before.

Mr. Tanner: Cross-examine.

Cross-Examination

By Mr. Erskine Wood:

Q. Mrs. Wilhite, how old is your husband?

A. He is sixty-two.

Q. Was he married when he was twenty?

A. Married when he was just twenty.

Mr. Erskine Wood: That is all.

Mr. Tanner: Thank you, Mrs. Wilhite.

(Witness excused.) [69]

REVA HOBKIRK

was thereupon produced as a witness in behalf of the Libelant herein and was examined and testified as follows:

The Clerk: What is your name?

Reva Hobkirk: Reva Hobkirk.

(The witness was then duly sworn.)

(Testimony of Reva Hobkirk.)

Direct Examination

By Mr. Tanner :

Q. Mrs. Hobkirk, is it? A. That is right.

Q. Hobkirk? A. That is right.

Q. And you are the daughter of Mr. Wilhite, are you not? A. I am.

Q. Mrs. Hobkirk, when did you see him after—how long was it after he was hurt that you saw him, do you recall?

A. The night that he arrived home.

Q. You were home when he got back, were you?

A. No, I wasn't. I happen to live next door, so when he came home the little granddaughter ran over and she said, "Grandpa is home," and that is the first that I seen him.

Q. Just eliminate conversations about this. You found out from the granddaughter that your father was home? A. That is right. [70]

Q. Now, you went over there, did you?

A. I did.

Q. Did you observe anything unusual about his condition? A. Definitely.

Q. And what did you observe?

A. Well, he was just sort of dense, and he didn't much to say and he retired immediately after he saw the family.

Q. And did you see him frequently?

A. Yes, I did. Of course, we were very concerned, because we knew—we hadn't known that he

(Testimony of Reva Hobkirk.)

had had an accident. Until he arrived home we didn't know it.

Q. Now, what change have you noticed, and over what period of time, about your father, different than the way he was before he took that trip?

A. Well, Dad was always very constructive, being a carpenter, and he was always doing things in the home, and I can't say that he has done anything since then, due to suffering from headaches. And he was a great reader, but now all he does is look at pictures in Life magazine, and that sort of thing, and he retires to the davenport on all occasions while he is in the house.

Q. And have you noticed any difference in his faculties, his memory, and things like that, when you have conversed with him? [71]

A. Well, yes, he is different, entirely different.

Q. In what way, Mrs. Hobkirk?

A. Well, his conversation is just different and, oh, perhaps I should say childish. He don't have the business manner he used to have.

Mr. Tanner: I think you may inquire.

Mr. Erskine Wood: No cross examination.

(Witness excused.)

Mr. Tanner: Just this one witness, your Honor, and that will be our case. We will have one question. [72]

KONSTANTINE GEORGE

was thereupon recalled as a witness in behalf of the Libelant herein and, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Tanner:

Q. Could you tell us, Mr. George, when the Franklin K. Lane returned to Portland and you were paid off?

A. Well, we never did return to Portland. We were paid off in New Orleans—I can't tell you the exact date, but as quick as I signed free on the ship, but it was approximately the middle of April.

Q. The middle of April of 1946?

A. Correct.

Q. What was the length of that voyage, can you recall?

A. Well, I signed on articles on January 3rd. From January 3rd until about the middle of April. I don't remember the exact length of time.

Mr. Tanner: All right, that is all.

(Witness excused.)

Mr. Tanner: That is the Libelant's case, your Honor.

The Court: Very well, the court will stand in recess until 2:00 o'clock this afternoon. [73]

(Whereupon, at 12:00 o'clock noon, January 16th, 1947, a recess was had until 2:00 o'clock P.M.) [74]

Afternoon Session, 2:00 p.m.

Mr. Tanner: Your Honor, I'd like to have the record reflect at this time what the regulation—I understand of it—of the War Shipping Administration with reference to the amount that is allowed for maintenance and cure is. It is a flexible amount depending on the cost of living, and Counsel has consented that we can put into the record that they are allowing \$3.50 a day for their maintenance.

Mr. Erskine Wood: That is without any admission this man is entitled to it.

Mr. Tanner: I understand that, but that is the amount being allowed. That is left to the Court to determine what is reasonable for a man's food and keep.

The Court: Very well. Let the record show that it is agreed between counsel that the rate allowed generally for maintenance and cure is \$3.50 a day. Proceed, Gentlemen.

Mr. Erskine Wood: Call Dr. Raaf.

DR. JOHN RAAF

was thereupon produced as a witness in behalf of Respondent and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Erskine Wood:

Q. Dr. Raaf, you are a practicing physician here in Portland, [75] are you, physician and surgeon?
A. That is correct.

(Testimony of Dr. John Raaf.)

Q. Will you please state your qualifications?

A. I went to Stanford University Medical School, finished my senior year at Stanford University in 1929, and I had an internship at Rochester Municipal and Strawn Memorial Hospitals in Rochester, New York. I stayed there a second year and then I went to the Mayo Clinic in Rochester, Minnesota, and I was there five years in neurology and neurosurgery and general surgery. I have practiced in Portland since 1936.

Q. What medical society do you belong to?

A. I belong to the Multnomah County Medical society, the Oregon State Medical Society, the American Medical Association, American Association for Surgery of Trauma, the Harvey Cushing Society, the American Acedemy of Neurosurgery, and possibly some others I don't remember.

Q. Do you lecture in any subjects in the University of Oregon Medical School?

A. I have charge of the Department of Neurosurgery and I lecture in neurosurgery at the University of Oregon Medical School.

Q. What specialization do you make of injuries to the brain or head?

A. My practice is confined to neurological diagnosis and [76] surgery, that is diagnosis and surgery of diseases and injuries of the nervous system.

Q. That necessarily includes injuries?

A. That includes the brain and spinal cord and nerves throughout the body.

(Testimony of Dr. John Raaf.)

Q. Did you make an examination of Mr. Wilhite on behalf of respondent in this case?

A. I did, sir.

Q. When was it?

A. He was first seen in my office on February the 20th, 1946.

Q. And did you see him more than once?

A. I did.

Q. When else did you see him?

A. He was seen again on April 29, 1946.

Q. Is that the last time you saw him?

A. No. He was seen again on the 26th of July, 1946, and I believe that is the last time I saw him.

Q. And did you examine him particularly for an alleged injury to his head resulting in headaches and so forth?

A. I did.

Q. Did you find any objective symptoms at all?

A. I did not.

Q. What subjective symptoms did he complain to you about? [77]

A. He was complaining of headaches, double vision, ringing in his ears, and numbness of the right arm at night.

Q. None of those are objective things, are they?

A. They are not.

Q. What did he tell you had happened to him at the time of this accident?

A. He stated that on January the 23rd, 1946, he was on a boat, raised up suddenly and hit his head on a 6 by 6 timber, fell to his knees, felt stunned, but was not unconscious. Although he had

(Testimony of Dr. John Raaf.)

a headache he continued to work. The next day his headache persisted and he felt as if he could not walk straight. He went to Vancouver, British Columbia, was paid off the ship on the advise of a physician. His headache persisted and was so severe he stopped en route to Portland because any jarring aggravated his condition.

He noted some variable double vision during, or since the injury, which is not constant but is present every day, but he said it would come and go during the day. He has not been able to drive his car since the injury because of the double vision, the headache, and a little dizziness. His headache is less severe, but that the double vision is as marked as ever. He has continuous ringing in the ear since the accident. He has never been unconscious since the accident. He awakens at night with his head throbbing. His eyes bother [78] him some and his vision is blurred when he reads. Since the accident the arm feels numb at night, but this does not occur in the daytime.

Q. Now, the evidence in this case today is that this man struck the top of his head on a wooden beam, that he was not running, walking at the time, was wearing a cap, that he didn't cut his scalp, there is no evidence that his head was bruised, that he was not knocked down, although he was staggered, he was not unconscious, he and his mates laughed about it, but he went on about his work, although he had a headache, and he found it somewhat difficult to work and lay on his bunk because of headache, and

(Testimony of Dr. John Raaf.)

he says that those conditions practically continue to the present time, that is to say, headache and occasional dizziness, once in a while loss of balance, feeling of loss of balance, but particularly the headache is what he complains of. I'd like to ask whether since these symptoms still persist a year after the accident what is your opinion as to whether they probably are or are not a result of the accident?

Mr. Tanner: I object to that, your Honor. He has asked the Doctor to assume a state in the record that is not in accordance with my recollection of the testimony. My recollection, your Honor, is that there was a soreness at the top of the head immediately after, so sore he couldn't touch it. [79] Now, if that is what he means by bruising, I don't know, but I think that ought to be included in any hypothetical question that is given to the Doctor.

The Court: Yes, I agree with that, that there was a soreness of the head, and he also testified, as I recollect, when his head came in contact with the timber that he felt dazed, and while he was doing his work thereafter he felt dizzy.

Mr. Wood: I would like those factors to be supplemented and included in my question, and I will strike out what I said about the men laughing about it. Perhaps that is inaccurate.

A. Well, it seems to me that if one year later these symptoms have persisted in their same intensity as they were at first that they are not due to the injury. The injury seemed relatively minor, and

(Testimony of Dr. John Raaf.)

it seems logical to assume that the symptoms from the head injury would have subsided long ago.

Q. (By Mr. Erskine Wood): The man claims that his vision was impaired by this blow. I'd like you to state your opinion whether that is possible or not.

A. Well, I don't believe his vision could have been impaired by that minor a blow without any skull fracture and without any evidence of a tearing of the brain or bruising of the brain. [80]

Q. What other possible causes could be of these headaches and dizziness and things he complains of?

A. I assume you mean the headaches and dizziness that he now complains of at the present time?

Q. Yes.

A. Well, of course, they could be due to things like high blood pressure or anxiety or constipation or any sort of illness; any number of illnesses can cause headaches.

Q. You mentioned high blood pressure. Did you in your examination of him find out anything about his blood pressure?

A. His blood pressure at the time I saw him was 174 over 110, which is an elevated blood pressure.

Q. Would that be a possible cause of these symptoms? A. Could be.

Q. That would be an objective finding in your examination, would it not, not subjective?

A. High blood pressure, yes. Yes, the high blood pressure is an objective finding.

Mr. Erskine Wood: I think that is all.

(Testimony of Dr. John Raaf.)

Cross-Examination

By Mr. Tanner:

Q. Would your answer be any different, Doctor, if the symptoms had, and the complaints had become less following [81] the accident, had diminished somewhat?

Mr. Erskine Wood: In what degree?

Q. (By Mr. Tanner): I don't want to mislead you, Doctor. I noticed you prefaced your answer, "If they persist in the same intensity." Do you place any particular significance on that part of your answer?

A. I would think that the headaches and dizziness and ringing in the ears and the numbness of his arm, which he complained of at the time I saw him, which was approximately a month after the blow on the head, would have subsided completely within a year, had it been due to the blow on the head. In other words, we know that a blow on the head can produce the symptoms which he stated, but a blow of minor degree such as his apparently was, which did not fracture his skull, I would think would have gone away by this time.

Q. Well, now, Doctor, isn't it a fact that there is no regeneration of brain cells?

A. Yes, that is correct.

Q. So that any injury that would be due to a destruction of any particular brain cell, you wouldn't expect that brain cell to ever regenerate, would you, Doctor?

A. No, I wouldn't.

(Testimony of Dr. John Raaf.)

Q. Now, you said something about this blood pressure being elevated. Now, Doctor, would you say that that is anything [82] particularly abnormal, considering a man of his age?

A. Yes, his blood pressure was higher than it should be for a man of his age.

Q. Well, it is above normal, but it is within the range of what you would find, isn't it, among——

A. Not among normal individuals. Of course, we find high blood pressure, that is true, but his is higher than it should be for his age.

Q. That is something that changes very often—it might have been less at other times? Isn't there a variation, Doctor, as much as 20 points that you find between examinations?

A. Yes, that is a possibility.

Q. And if you would reduce this 20 points on the systolic it wouldn't be out of line, would it?

A. No, I would say if his blood pressure were 154 instead of 174 it possibly would be on the upper limits of normal for a man of that age.

Q. Now, don't you find, Doctor, that this blood pressure frequently is affected by anxiety and things of that kind over one's condition?

A. Blood pressure will change with anxiety or emotion.

Q. And you found him rather concerned about his condition, didn't you, Doctor? [83]

A. Well, I don't recall that I did. Naturally he was concerned about what was causing his symptoms, but I don't remember that he was extremely

(Testimony of Dr. John Raaf.)

upset about it or that he was, you might say, jittery or nervous.

Q. Well, you have no reason to question the history that he gave you of this, have you, Doctor, his concern over it? A. No, that is right.

Mr. Tanner: I think that is all.

Redirect Examination

By Mr. Erskine Wood:

Q. I forgot to ask you one thing. This man testified he was struck on the upper, on the back part of the upper part of his skull. About here he put his hand (illustrating). I want to ask you whether that is of the more vulnerable portions of the skull, or otherwise?

A. It is one of the less vulnerable portions, you might say. In other words, it does not overlie the most vulnerable parts of the brain.

Mr. Erskine Wood: That is all.

Recross-Examination

By Mr. Tanner:

Q. Well, now, look, Doctor, isn't it a fact that the injury to the brain cells frequently occurs in places other than where the impact occurred? [84]

A. That is correct.

Q. So that it isn't significant at all where, so far as injury to the brain cells are concerned, where it occurred. It is in a liquid form, is it not, the brain, so that the force might be applied elsewhere, isn't that so, Doctor?

(Testimony of Dr. John Raaf.)

A. Yes, that is true. Of course, we have no evidence here that he ever had injury to the brain cells.

Q. Well, you have some evidence; his history would indicate that he was, that is, that he had had an injury to his, to the nervous system, wouldn't it?

A. He received a blow on the head, that is true, but from the evidence that we have, that is from our examination, from the X-rays of the skull, from the electroencephalogram, which is a test of brain activity by an electrical means, and there is no evidence that there was damage to the brain cells.

Q. Now, what you are saying now is that you couldn't elicit any objective symptoms of it?

A. That is right.

Q. But you wouldn't be prepared to say under oath that there wasn't, would you, Doctor?

A. No, I would not. The injury might have been so minute that we couldn't detect it by clinical means or by, of course, the X-ray of the skull.

Q. Well, the symptoms which he described are typical of [85] concussion, are they not, Doctor?

A. Of course, we get into an argument as to what concussion is, but the one symptom of concussion is unconsciousness, and he had no unconsciousness, as I understand it, following the blow on the head.

Q. Well, that is just one symptom, isn't it?

A. Well, that is the symptom that most people use to diagnose concussion, that is, a known blow on the head followed by unconsciousness.

(Testimony of Dr. John Raaf.)

Q. Let's talk about injury to the neurological system, then, if you don't like that term. He had dizziness. Now, that is a symptom of an injury?

A. That is a symptom of injury to the brain, yes.

Q. And he had what was known as, was dazed. That would be an injury or a symptom of injury, wouldn't it? A. That is right.

Q. Now, don't you say that that is part of a concussion symptom, aren't they?

A. There again we get into an argument as to what technically concussion is. My definition of concussion is that a patient has to be rendered unconscious in order to make the diagnosis of concussion. Now, of course, you can have an injury to the brain such as a tearing of the brain without—and massive injury to the brain—in other words, without concussion. [86] Of course, this is technical, but for a doctor a concussion means a period of unconsciousness.

Q. All right. But, then, you can have some very severe injuries to the central nervous system without that, can't you? A. Without that—

Q. Without being rendered unconscious?

A. That is right.

Mr. Tanner: I think that is all.

(Witness excused.)

The Court: Call your next witness.

Mr. Erskine Wood: Call Mr. Nyborg. [87]

ROBERT N. NYBORG

was thereupon produced as a witness in behalf of Respondent and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Erskine Wood:

Q. Mr. Nyborg, you are a resident of Portland, I believe? A. Yes, sir.

Q. Speak a little louder, will you?

A. Yes, sir.

Q. And what is your occupation?

A. Naval architect.

Q. And what company are you employed by?

A. Oregon Shipbuilding Corporation.

Q. That is one of the Kaiser shipbuilding companies, is it not? A. Yes, sir.

Q. Kaiser-managed? A. Yes, sir.

Q. That company built a great many Liberty ships during the war, did it not?

A. Yes, sir.

Q. Were you a Naval architect for the company during that period? A. Yes, sir. [88]

Q. Are you familiar with the construction of Liberty ships? A. Yes, sir.

Q. You hold the plans of Liberty ships in your hands, do you not? A. Yes, I do.

Q. What is the distance on a Liberty ship from the bulkhead of the after deckhouse to the stern of the ship? A. 18 feet to the bulwark rail.

Q. And what is the width of the deck at that place by the after deckhouse, after bulkhead?

A. Approximately 30 feet.

(Testimony of Robert N. Nyborg.)

Q. This might be a trifle leading, but I don't think it would be objectionable. The after deck-house might be likened to a square box placed on that part of the deck of a ship, might it not?

A. Yes.

Q. What is its purpose?

A. It has quarters in it, quarters for the crew.

Q. And on top of it is the after gun platform, is it not? A. Yes, sir.

Q. And that gun platform extends aft on the deckhouse over the deck, does it not?

A. Yes, sir. [89]

Q. Does it also, does the gun platform also extend forward of the deckhouse? A. No, sir.

Q. How far does the gun platform extend aft from the deckhouse? A. 10 feet.

Q. Then, aft of the deckhouse you have a space, if I understand you, of open deck 30 feet in width by 18 feet in length, at the longest longitude?

A. Yes. It is triangular in shape, the shape of the stern coming to a peak.

Q. And that is all open, clear space, is it?

A. Yes, sir.

Q. What is the headroom underneath the after gun deck platform?

A. There should be absolute clearance of 7 feet, six eleven, 6 feet 11 inches.

Q. 6 feet 11 inches? A. Yes.

Q. The after gun deck platform is reenforced or strengthened, is it not, by a lateral angle iron?

A. Beams, yes, angle-iron beams.

(Testimony of Robert N. Nyborg.)

Q. How far do they extend downward from the gun deck platform proper? [90]

A. 6 inches.

Q. 6 inches. Now, when you say that the clearance is, did you say 7 feet?

A. 7 feet beneath those beams.

Q. That is what I was going to say, you mean the clearance is 7 feet beneath the beams?

A. Yes, sir.

Q. Those beams are fore and aft, are they not?

A. Those beams——

Q. My associate says I called them lateral beams. I mean horizontal.

A. Yes, that is what I thought.

Q. Horizontal, but fore and aft?

A. Yes. The beam I was speaking of was running fore and aft. There are athwartship beams as well.

Q. Where are they?

A. In the same vicinity.

Q. Are they of the same size so that they leave the headroom as you described it, or otherwise?

A. No, they are not as deep as the beam I was speaking of.

Q. Not as deep?

A. They are 4 inches deep.

Q. So they would not affect the headroom?

A. No. [91]

Mr. Erskine Wood: That is all.

Mr. Tanner: No questions.

(Witness excused.)

The Court: Call your next witness.

Mr. Erskine Wood: I will call Captain Childs.

CAPTAIN RICHARD CHILDS

was thereupon produced as a witness in behalf of respondent and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Erskine Wood:

Q. Captain Childs, where is your home?

A. In Portland, Oregon, sir.

Q. What is your occupation?

A. Professional seaman.

Q. You are a Master now, though, aren't you?

A. Yes, sir.

Q. How long have you held Master's papers?

A. I have held Master's papers for close onto 15 years.

Q. Besides holding the papers, have you actually been Master of vessels? [92] A. I have.

Q. Are you a Master of a vessel now?

A. I am at present, yes, sir.

Q. How long have you been actually Master of vessels? A. Approximately 8 years.

Q. Did you serve as such during the war?

A. I did.

Q. What runs were you on in the war?

A. Well, on various runs, South Atlantic, Murmansk run, and the last two years of the war I put in the South Pacific.

Q. You mentioned the Murmansk run. You

(Testimony of Captain Richard Childs.)

mean that one that was so dangerous running up to the Russians?

A. Well, it was kind of warm at times.

Q. I believe you yourself lost a ship there, didn't you?

A. I did, yes, sir.

Mr. Tanner: That wouldn't be material as far as this matter is concerned.

Mr. Erskine Wood: That is true.

Q. You are familiar, I take it, with the general construction of Liberty ships?

A. I am.

Q. Particularly around the fantail?

A. Yes, sir.

Q. I don't know whether you have been in the courtroom all [93] the time, but the testimony here has been that some members of the crew hung some life rings from one of the fog buoys from underneath the after gun deck platform and suspended them there for the purpose of painting, lowered the fog buoy 6 or 8 inches for that purpose. I'd like to ask you in the first place what is the necessity for painting these life rings?

A. Well, they are constructed of cork with a canvas cover and that canvas cover must be protected by paint to keep rot away, and it is required by the United States Government Inspectors that they be kept in condition, and it is usual to paint them once a year.

Q. What would you say as to whether it was or was not a proper place to hang them to do that work?

A. Well, I would say that it is a proper place as it is more or less out of the weather, and if it

(Testimony of Captain Richard Childs.)

should be raining or blowing, why, you can at least keep them dry there.

Q. What space is there there for doing this work, how much of a space is there there?

A. Well, from the after bulkhead of the after deckhouse there to the, back to the bulwark rail, it would be approximately 18 feet in length by 28 or 30 foot in width.

Q. Would you say that was ample room?

A. I would, yes. [94]

Q. It is really an open deck there, isn't it?

A. It is an open deck. It is a continuation of the main deck.

Q. What is the diameter of the life rings?

A. 30 inches over all.

Q. I believe there was some testimony by Mr. Wilhite this morning that he couldn't pass under this fog buoy standing upright, but he would have to bend over if he wanted to avoid hitting his head. I would like to ask you whether or not there are many places on a vessel where a man has to duck his head, where he has to do it——

Mr. Tanner: Don't answer that. I object to that as being immaterial, irrelevant, your Honor.

The Court: Sustained.

Q. (By Mr. Erskine Wood): I'd like to ask you something, Captain, about the general hazards of a seaman's life on a ship in going about the ship, what he has to avoid——

Mr. Tanner: We object to that inquiry.

The Court: Sustained.

(Testimony of Captain Richard Childs.)

Mr. Erskine Wood: I don't want to impinge the Court's rule, but I would like to ask this: What are conditions on a ship in respect to the men having to go into many cramped quarters and narrow spaces to do their work.

Mr. Tanner: Well, we admit that, your Honor.

The Court: Sustained.

Q. (By Mr. Erskine Wood): These fog buoys are not all exactly alike, are they, Captain?

A. No, there are many different types of them. Some are constructed of metal and wood and some of wood alone.

Q. Well, can you give us an idea of the usual length of them?

A. Well, I have had them with me that would be around 5 to 6 foot in length on some ships, and then on other ships I have had them made of timber, 4 by 4 or 4 by 6 timber, that would go up to 10 or 12 foot in length.

Q. How much? A. 10 or 12 foot.

Q. If a ship is lying starboard side to the dock, as the testimony is in this case, and the man was called from aft on the fantail and a man was on the port side when he was called, what would be the normal way for him to go forward?

A. Well, normally I would say to go up the port side. It would be the side away from the dock and you would be away from cargoes being worked aboard with the ship's gear and away from the

(Testimony of Captain Richard Childs.)

gangway and any obstructions there pertaining to the cargo.

Mr. Erskine Wood: That is all. [96]

Cross-Examination

By Mr. Tanner:

Q. Doesn't it depend very largely, Captain Childs, whether or not there are some other obstructions or some other things at the various places when men choose their paths that they take to go from one place of the vessel to another, isn't it governed largely by the conditions that prevail?

A. Naturally it does, yes, sir.

Q. So that sometimes, when you say ordinarily they would go a certain route, why, you would alter that if there was some condition that might exist that would prompt him to go another route, wouldn't you?

A. If there were deck cargo on or anything else to make an obstruction there.

Q. Debris and such as that?

A. That is right.

Mr. Tanner: That is all.

Mr. Erskine Wood: That is all.

(Witness excused.)

Mr. Wood: I would like to call Mr. Wilhite.

The Court: Very well. Take the witness stand, Mr. Wilhite. [97]

BENJAMIN N. WILHITE

was thereupon recalled as a witness and, having been previously duly sworn, was examined in behalf of respondent and testified as follows:

Direct Examination

By Mr. Erskine Wood:

Q. I would like to ask you, Mr. Wilhite, whether in giving your testimony about this matter some time last year when you gave a deposition, whether you didn't testify in this manner:

“Question: Did you duck your head as you went under these logs?”

“Answer: I didn't then because I didn't know that was down. The life rings are hung so thick sometimes. I was parting them so I wouldn't get paint on me, see.”

Do you remember——

Mr. Tanner: He has covered that.

The Court: Sustained. You asked him that question on cross-examination and he said that he didn't remember.

Mr. Erskine Wood: He only then said he didn't remember, your Honor.

The Court: That is right. That should close it, unless you have some reason to believe his memory has been refreshed since that time. It seems to me it is a question that has been put and answered on his cross-examination. [98]

Mr. Erskine Wood: I would like to ask him one other question.

The Court: Very well.

(Testimony of Benjamin N. Wilhite.)

Q. (By Mr. Erskine Wood): Now, on that occasion I will ask you if you testified like this:

“Question: What time of day did this accident happen?”

“Answer: Well, I think it was about 4:30, something like that.”

Did you testify so?

A. I don't remember, I am sure.

Mr. Erskine Wood: I will offer the portions of this deposition where he did so testify. I will put them in evidence. Pages 7 and 12.

Mr. Tanner: We can read it into the record.

Mr. Erskine Wood: Very well.

The Court: That might probably be the better way of getting it into the record.

Mr. Erskine Wood: I will read into the record according to the order of the Court.

“Question: Did you duck your head as you went under these logs?”

“Answer: I didn't then because I didn't know that was down. The life rings are hung so [99] thick sometimes. I was parting them so I wouldn't get paint on me, see.”

And the other portion which I read is:

“Question: What time of day did this accident happen?”

“Answer: Well, I think it was about 4:30, something like that. It was in the afternoon.

“Question: It was in the afternoon?”

“Answer: Yes.”

The Court: Let the record show that the portion just read by Counsel was read from a deposition of the witness taken as an adverse witness on behalf of the respondent on—what date was the deposition taken?

Mr. Erskine Wood: June 15, 1946.

The Court: June 15. Call your next witness.

Mr. Erskine Wood: I would like to recall Captain Childs for a further question. [100]

CAPTAIN RICHARD CHILDS

was thereupon recalled as a witness in behalf of respondent and, having been previously duly sworn, was examined and testified further as follows:

Further Direct Examination

By Mr. Erskine Wood:

Q. Captain Childs, this injury is said to have occurred on January the 20th, 1946. It relates to a seaman's employment and the continuity of it. I want to ask you since that time if there have or have not been tie-ups of shipping due to strikes?

Mr. Tanner: I am going to object to that as being immaterial and irrelevant.

The Court: Sustained.

Mr. Erskine Wood: That is all, Captain.

(Witness excused.)

Mr. Erskine Wood: That is respondent's case.

The Court: Any rebuttal?

Mr. Tanner: No, your Honor.

The Court: Now, do you gentlemen desire to file

briefs or make argument to the Court in this matter?

Mr. Tanner: We won't impose on the Court—we agree with the Court's observation that the facts are very simple. [101] If the Court wants any points on any matters we would be very happy to cooperate by submitting any information that the Court may desire on any law question that the Court may want to be informed on, but on the factual matters I think we wouldn't care to impose on the Court on those matters.

Mr. Erskine Wood: We do not desire to file any briefs. We should like to make short oral argument.

The Court: Very well. I will hear you.

Mr. Erskine Wood: Do you wish to open?

Mr. Tanner: I think if we waive—I had supposed that if Counsel—I might reserve for rebuttal, but I supposed when opening argument was waived that closed them off, but these new rules, your Honor——

The Court: That may be true, but then I feel inclined to let Counsel make a statement.

Mr. Tanner: Very well. Could we have just a little time to answer what observations he might make?

The Court: Yes, you will have opportunity.

Mr. Erskine B. Wood: May it please the Court, I only want to make a very short argument on the facts of this case.

First of all, the duty of care owed by the owner of the ship—in this case the United States Govern-

ment is the owner of the ship being sued—is merely that of [102] providing ordinary and reasonable care, and that would be conceded by Counsel, that there is no extraordinary duty. It is the usual common-law definition of negligence that the ship owner has to exercise reasonable, ordinary care for the protection of the seamen. Now, here we have a case that the afterdeck of this ship is 18 feet long by about 30 feet wide, as good a place as any on the ship for doing necessary work of painting life rings, from the fog buoy in underneath the overhang of the gun platform. It seems a clearly proper place to do the work.

Now, their witness, their first witness, Captain Carlsen, did talk about passageways. This wasn't a passageway at all, but he said where you had a passageway—which this was not—and you had some object hung overhead to obstruct one's passage you might guard it or protect is some way so men wouldn't run into it in the dark. His testimony was for the purpose of avoiding a man hitting it in the dark, bumping into it in the dark. This isn't in the dark. It is the testimony today the accident happened in the morning. The testimony in the adverse party deposition is that it was in the afternoon. Anyway, it was broad daylight, men working there. These ring buoys are white objects, all hanging from this beam. The thing was perfectly open, obvious and conspicuous. No one who looked could have [103] avoided seeing it. It was not a passageway. It was simply a place on the afterdeck of the ship where the men were doing this work.

Their witness, the boatswain, came here and testified that he was the man who had charge of superintending the work of the seamen aboard the ship. He was there. He admits seeing that the ring buoys were hanging from this beam. He saw the work was being done there and that the men were painting and he didn't think anything of it at the time. He, as I get the general drift of what he tries to say now, is that maybe he intended to imply that it was a dangerous condition, but he admits being there and seeing it, and if there was anything dangerous about it it was his job to correct it. Nobody thought anything of it at the time. And he then said that his mother had broken her hip and he was worried about that, but that certainly if it was a dangerous condition there a boatswain seeing it would correct it. And in another part of his testimony he said, "I saw it there but I didn't think anything of it."

So the facts are simple and they don't require any extended argument. Here was a beam hung under there from which there was plenty of room to walk under if you ducked your head, and it is admitted by Counsel that there [104] are many places all over a ship where you have to crawl through, passageways, all the watertight doors on ships——

The Court: Well, that is true, Counsel, but those kind of places the crew usually knows that they are narrow or unobstructed places and anticipate that they will be required to crawl or in some way make themselves smaller, but I believe the testimony here

is apparently without conflict that these beams or fog buoys were lashed under the gun deck in such a way that it wouldn't permit an upright passage by a workman under the beams. In other words, it was a place where it was not known there was a need to bend or make yourself small in any way in getting under. Now, the one beam, at least, apparently from the testimony, was low. It was lowered in such a way as to obstruct the headroom, unknown to the libelant.

Mr. Erskine B. Wood: Of course, it was in broad daylight with life rings hung from it.

The Court: Well, that is true, and had the contention been that the life rings themselves caused any injury your argument in my opinion might be very, very good, because they would give warning, but there was no injury that was caused by the life rings themselves.

Mr. Erskine B. Wood: Of course, the fog buoy would have to be lowered in order to put a lashing around the top [105] of it to hang these life rings onto, bring them low enough.

The Court: That is true enough, Counsel, and that appears obvious to us now, but whether it appeared so obvious to a workman busy at the time and expecting a free and unenhampered passageway so far as an overhead beam is concerned is doubtful. I think that the most that could be there is whether or not that the action of the libelant proceeding as he did constituted any degree of contributory negligence. That is the most that can be said.

Mr. Erskine B. Wood: We feel clearly it was negligence on the libelant's part, running into the objects, but we also feel no negligence whatever on the ship owner's part in simply having the men—the men have to paint these buoys someplace on the ship. They could go on one of the forward decks and hang them there, but somebody might, if he wasn't looking where he was going in broad daylight, run into whatever they were hung from on the forward deck. This was a convenient, accessible place in an area 30 feet by 20 feet and only a small portion of that area was used up by this buoy and the life rings hanging from it. It was part of the decks of the ship, one of the working spaces of the ship, and they were only engaged in doing normal ship's work on one of the working places of the ship. [106]

And, your Honor, by hindsight, looking back at this, you might say if something else had been done the accident wouldn't have happened, but here we have the boatswain who was on the job supervising this work, the men who lowered that, and all of them apparently at the time thought it was an ordinary, reasonable, prudent thing to do. We can only judge the ship owner's duty of ordinary and reasonable care by the conditions existing there at that time.

Now, where experienced seamen were there doing that work and none of them saw or foresaw any danger at that time, there is no negligence. It seems to me it comes down to the question of whether: Is it foreseeable that a risk has been created which is likely to result in an injury? And here with their

own witness, the boatswain, whom they don't apparently charge with being a careless man, and he said he thought nothing of that condition when he saw that the men were painting the life rings there; so, if you look at it from the point of view of foreseeability of an injury and the fact they were doing this work on a large open deck of the ship, taking up only a fraction of the space of that deck, lots of room elsewhere, in broad daylight, I can't in my own mind, your Honor, conceive that there is any negligence for which a ship owner could be liable.

Of course, there is also the element of proximate cause, your Honor, Dr. Raaf's testimony, whom you just heard, that in his opinion what bump this man received on his head is not sufficient to account for his injuries, and since you have just heard the Doctor's testimony I am not going to argue the point of proximate cause.

Mr. Erskine Wood: I would like to say just one word on the matter of proximate cause, your Honor. I would like to observe first that the only evidence they have put in at all of this injury, the only medical evidence, is an abstract of the records from the Public Health which merely contains a narrative statement from the man, the Public Health doctor, of what happened and the Doctor's diagnosis on that was that the man would go back to work in a week. That is all they did. They admit they sent this man to a Dr. Lucas in this town, their own doctor. They haven't called him, and the inference is Dr. Lucas would give unfavorable testimony. Now, we have called Dr. Raaf, one of the most emi-

ment brain men and neurological men in the city, and he has given it as his opinion that this trouble doesn't come from this blow.

The Court: That is true. I listened to the Doctor's testimony with interest. He made an examination and he didn't say that he found anything in his examination which would justify the symptoms that the plaintiff complains of, [108] in other words, that no other cause—he said that other things could have caused it. Then he made an examination and he didn't say there was anything that he found that he could attribute the symptoms to.

Mr. Erskine Wood: I don't think that I agree with your Honor's interpretation of the Doctor's testimony. He said that when he examined the man in the beginning, he said if the man's story is true these subjective symptoms could have come from this, if his story is true.

The Court: That is true.

Mr. Erskine Wood: But at that time the man's story was that he had sunk to his knees from the force of this blow, which is not true, but now Dr. Raaf says with the continued persistency of these symptoms, accompanied by the fact the man has high blood pressure, leads him to believe these symptoms come from high blood pressure or some other of many other causes.

The Court: That was the point that I was making, Counsel. The Doctor said there might be many other causes. The Doctor, aside from high blood pressure, on his examination found no other conditions or cause that he attributed the symptoms to.

Mr. Erskine Wood: I don't think he has to point out what the symptoms come from when he says, "I don't think [109] they come from this." Now, I don't want to file any brief, as I said, but I do want to cite to your Honor Judge Taft's decision when he was on the Circuit Court of Appeals in the case of Ewing against Wood. I will cite it to you, send it to your Clerk, furnish Counsel the citation, in which a case quite similar to this, involving vision, and he said that the Court cannot speculate on cause. If the injury could be received from several causes the Court can't guess at them. The plaintiff must fail because the plaintiff's testimony must point to the fact not only that they probably caused this result but it did cause it. I would like to cite your Honor that case.

The Court: I would be very happy to read it, because I certainly wouldn't at this stage at all put my opinion against that of Judge Taft.

Mr. Tanner: Well, your Honor, you needn't have any hesitancy in failing or neglecting or refusing to follow Judge Taft's interpretation of the Federal Employers' Liability Act. The very language of which he discusses received very careful attention by our Supreme Court in a very recent decision which I would like to direct your Honor's attention to, the case of Tennant vs. Peoria & Pekin Union Railway, 64 Supreme Court 409.

The Court: Is that the official citation of that?

Mr. Tanner: I don't have it.

The Court: Will you get it and give it to my secretary?

Mr. Tanner: I will do it and send it to you. But very recently they have re-examined the duties that the law imposes on an employer; and while I dislike very much to contradict Counsel in his statement of the law——

The Court: Doesn't the evidence here establish the duty?

Mr. Tanner: Yes, of course it does.

The Court: Isn't the testimony uncontradicted here that the proper way to lash these beams was to lash them in such a way that there would be a 7-foot clearance?

Mr. Tanner: That is the question.

The Court: There seems to be no conflict on the evidence in that as to what ordinary care consisted of in that degree. There is one matter I would like to hear from you on, though, Counsel, and that is this: In the event that I should determine that there was a failure to exercise ordinary care as far as the seaman was concerned, I would like to hear from you as to that. What is your contention?

Mr. Tanner: Well, my contention is that we are entitled to a substantial award.

The Court: How long do you contend for maintenance [111] and cure?

Mr. Tanner: Four months.

The Court: Very well. Now, as to what——

Mr. Tanner: We maintained the maintenance and cure is four months and wages, special damages for a like period.

Now, on the general damages, your Honor, we have got a man who in the period of his usefulness

—and not an old man by any means, sixty-one—in whom those intimately associated with him observe a marked change in his entire personality, and we believe, your Honor, that when those changes are brought about as abrupt as these were brought about in this case and under the circumstances under which they were brought about, we believe that \$12,500 would not be amiss, and I believe, your Honor, I can find ample cases where in admiralty they have allowed such amounts. That would be my idea. If the Court wants to know what would be a fair award, I would say not less than \$12,500.

The Court: But, under the testimony of the libelant there has been to some extent a continuous improvement in his condition. He is able to work and has worked, and from that it would be reasonable to believe that his improvement would continue.

Mr. Tanner: Your Honor, it's been a year, and I invoke [112] the presumption that is referred to in the *Lexographer* on the doctrine of evidence that when conditions have existed over a period of time the presumption is they will continue, and this is a long period of time.

The Court: The conditions haven't existed. They are getting better. They haven't remained steady.

Mr. Tanner: He has said, your Honor, it is true, that some of these symptoms are not as bad as they were. There is no question but what there has been improvement. I don't mean to misstate the evidence. But he is unable to work; he can't do the

type of work that he had formerly done, and isn't able to do it at the present time. That is why I think, your Honor, we are entitled to a substantial award.

The Court: Well, I have a little different version of the evidence. Very well, the matter will be——

Mr. Erskine Wood: May I say a word on the question of damages since your Honor has asked about it. Evidently, as I gather your Honor's state of mind, you feel that there is liability here on the part of the ship, but certainly I am not going—I am just going to mention that certainly there is contributory negligence on the part of the man. I don't believe that needs argument, and I submit that to you.

The Court: Of course, I have had that in mind, Counsel. [113] It is one of the questions in the case as to whether or not there was contributory negligence.

Mr. Tanner: In examining the record I find nothing of that in the pleadings. That is an affirmative defense and it don't seem to be in this trial until now.

The Court: I don't think it is. If it appears from the plaintiff's case, it is——

Mr. Tanner: Of course, if it appears from the plaintiff's case, but I submit, your Honor, there is not one scintilla of evidence in the plaintiff's case, as far as I can garner, that would indicate that he wouldn't be exercising the care that would be expected of a workman.

The Court: Well, of course, all of the evidence as to what occurred at the time is in the plaintiff's case, and it was given either by the plaintiff or witnesses who were there, and no testimony on behalf of the defendant there; none of their witnesses were there. Very well. The matter will be taken under advisement by the Court and Court will stand adjourned until 10:00 o'clock tomorrow morning.

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

We, Cloyd D. Rauch and Glenn G. Foster, do hereby certify that we jointly reported in shorthand proceedings had at the trial of the above-entitled cause, that we subsequently caused our said shorthand notes to be reduced to typewriting, and that the numbered pages set opposite our names below were by us respectively transcribed from that portion of the testimony and proceedings reported by each of us in shorthand:

Cloyd D. Rauch, pages 1 to 74, inclusive;

Glenn G. Foster, pages 75 to 114, inclusive;

and we hereby further certify that the said pages so set out opposite our respective names constitute a full, true and accurate transcript of that portion of the testimony and proceedings so reported in shorthand by each of us as above certified, including objections and motions of counsel, rulings of the Court, exceptions taken, and other oral proceedings had at said trial.

Dated this 28th day of March, A. D. 1947.

/s/ CLOYD D. RAUCH,

Court Reporter,

/s/ GLENN G. FOSTER,

Court Reporter pro tem.

[Endorsed]: No. 11583. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Benjamin N. Wilhite, Appellee. Apostles on Appeal. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed April 12, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.